(25,424)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 594.

THE OHIO RIVER CONTRACT COMPANY, PLAINTIFF IN ERROR,

vs.

HONORABLE THOMAS R. GORDON, JUDGE JEFFERSON CIRCUIT COURT.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

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1 THE COMMONWEALTH OF KENTUCKY:

The Court of Appeals.

Pleas Before the Honorable the Court of Appeals of Kentucky, at the Capitol, at Frankfort, on the 26th Day of May, 1916.

THE OHIO RIVER CONTRACT COMPANY, Petitioner,
vs.
Honorable THOMAS R. GORDON, Judge, Respondent.

Be it remembered that on the 25th day of February, 1916, the petitioner by its attorneys filed in the Office of the Clerk of the Court of Appeals of Kentucky, its petition, and the following order, to-wit was entered in said Court of Appeals of Kentucky filing same.

2 Be it remembered that heretofore to-wit, on the 25th day of February 1916, the following order was entered in the Court of Appeals of Kentucky.

OHIO RIVER CONTRACT COMPANY, Petitioner,
vs.
Hon. THOMAS R. GORDAN, Judge, Respondent.

The petitioner Ohio River Contract Company filed herein its petition for a writ of prohibition with notice of motion and moved the court to enter an order restraining the Honorable Thomas R. Gordan, Judge of the Jefferson Circuit Court from proceeding further with the action of John J. Haines, plaintiff vs. The Ohio River Contract Company, referred to therein until this Court shall have passed upon the prayer of the petition and in support of motion filed transcript of record used in lower court which motion was submitted to the Court.

3 The Petition for Writ of Prohibition referred to in the foregoing order is in words and figures as follows:

Court of Appeals of Kentucky.

THE OHIO RIVER CONTRACT COMPANY, Petitioner,
vs.
Honorable THOMAS R. GORDAN, Judge of the Jefferson Circuit Court, Common Pleas Branch, Second Division, Respondent.

Petition for Writ of Prohibition.

Comes the Ohio River Contract Company, by counsel and for its Petition for Writ of Prohibition from this Court to the respond-

ent, The Honorable Thomas R. Gordan, Judge of the Jefferson Circuit Court, Common Pleas Branch, Second Division, says:

That your petitioner, The Ohio River Contract Company, is a corporation organized by and existing under the laws of the State of Indiana, and of that State only, and as such is qualified to sue and be sued, contract and be contracted with in its corporate name.

4 That your respondent, The Honorable Thomas R. Gordan, is a duly elected, qualified and acting judge of the Jefferson Circuit Court, which is a Court of inferior jurisidction, and is presiding over the Common Pleas Branch, Second Division of said Court.

That heretofore to-wit: on the 30th day of July, 1914, there was filed in the Jefferson Circuit Court a petition ordinary No. 86285, wherein one John J. Haines was plaintiff, and your petitioner and one Fred Swisher, were defendants, and which cause was assigned for hearing to the Common Pleas Branch, Second Division of said Court. In this petition there was alleged a cause of action by said Haines against your petitioner and the said Swisher, for certain personal injuries set out therein. Summons issued from said Court upon said petition and was served upon your petitioner's agent, as hereinafter more fully appears. Thereupon your petitioner appeared and filed its Petition for Removal of said cause to the United States District Court for the Western District of Kentucy, together with its bond conditioned according to law. Thereafter a transcript of the proceedings in the Jefferson Circuit Court was filed in the United States District Court for the Western District of Kentucky, and upon motion of the plaintiff to remand said cause to said Jefferson Circuit Court said motion was sustained and said cause was remanded. Thereupon your petitioner appeared and filed its motion to quash the return upon said summons, and in support of said motion filed various affidavits disclosing the following facts, 5 to-wit:

That the said Haines is, and at the institution of said action of law, and at all times mentioned therein, was a citizen and resident of the State of Kentucky; and that The Ohio River Contract Company is, and at the institution of said action at law, and at all times mentioned therein, and continuously since said times, was a non resident of the State of Kentucky, and a corporation organized and existing under the laws of, and was a citizen and resident of the State of Indiana, and of that State only, and maintained its principal place of business and rhe residence of all of its officers in said State. That at the time the cause of action alleged in the said petition filed by the said Haines arose, and at all of the times therein mentioned, and at the times that each and every summons issued in said action of law, was served upon The Ohio River Contract Company, said Contract Company was engaged in certain work and labor incident to the construction and erection of a lock, dam and canal, pursuant to a contract entered into by and between it and the United States of America, through its then Secretary of War, the Honorable William Lloyd Garri-

son. That the work and labor done by said Ohio River Contract Company under and pursuant to the said contract with the United States of America, and which was the only work or labor done or performed by it in or near to the Commonwealth of Kentucky, was performed wholly and entirely, save as hereinafter set out,
6 upon a certain tract of land acquired by the United States of America by purchase or condemnation by and with the consent of the Legislature of Kentucky; that the only part of said work or labor done or performed by said Contract Company outside of said tract of land acquired by the United States of America as aforesaid, consisted in dumping certain debris consisting of dirt and rocks dredged from said canal bottom, upon certain property contiguous to said tract of land, and which was controlled by the Kentucky & Indiana Terminal Railway Company; that the dumping of said debris was effected pursuant to an agreement entered into between said Terminal Railway Company and the United States of America, acting through its duly authorized Corps of Engineers; that for said privilege of dumping said debris no consideration, of any kind whatever, passed between the said Terminal Railway Company or the United States of America or the said Ohio River Contract Company; that the cause of action alleged by Haines in the said petition, and each and every person and instrumentality, either directly or indirectly connected therewith or contributing thereto, arose, and they were situated, wholly and exclusively within and upon said tract of land acquired by the United States of America, as aforesaid; that at the time the original summons issued upon said petition was served upon the agent of the Ohio River Contract Company, said agent and the deputy sheriff
7 who served said summons were standing upon a spot within and upon said tract of land acquired by the United States of America as aforesaid; that at the time the second or alias summons issued upon said petition was served upon said corporate agent, he was at his home in Louisville, Ky., and which was outside of said tract of land acquired by the United States of America as aforesaid, but he was not at that time acting as the agent or employe of the Ohio River Contract Company, nor was he performing any of his duties as such employe, but was at his home in his private and individual capacity; that the Ohio River Comtract Company has at no time been a citizen or resident of the Commonwealth of Kentucky, nor has it eveer done business in this State, except as above set out, and that its agents, officers, clerical force and instrumentalities, of every description, are now, and always have been located exclusively within and upon said tract of land acquired by the United States of America as aforesaid, and they have always been solely and exclusively engaged in the performance of the said contract, or contracts exactly similar thereto; that the work and labor which said Ohio River Contract Company was performing at the institution of the said action at law, and at all times set out therein, and at the time that each summon- issued therein was served upon it, and continuously since all of said times, and which is the only work it has ever done in or near to the Com-

monwealth of Kentucky, is, and has been strictly limited to the construction and erection of a lock, dam and canal upon the Ohio River near the City of Louisville, and wholly and entirely within and upon the said tract of land acquired by the United
8 States of America as aforesaid, and which said work and labor is performed sole- and exclusively under and according to the terms of the said contract entered into by and between said Contract Company and the United States of America and under the direct supervision and control of the United States Army Engineer in charge of the execution of said contract.

Your respondent's motion to quash the return upon the summons issued by the Jefferson Circuit Court was overruled. Your petitioner then filed its special demurrer to the jurisdiction of the Jefferson Circuit Court, and while demurrer was still pending in said Court, your petitioner filed in this Court its petition for a writ of prohibition. Upon it appearing that said special demurrer was still pending in the Jefferson Circuit Court your petitioner voluntarily dismissed without prejudice its said petition for a writ of prohibitio*b*, and after said special demurrer had been overruled by the Jefferson Circuit Court your petitioner filed therein its answer. In the first paragraph thereof it objected to the jurisdiction of said Court and in support of said objection it plead the following facts, to-wit:

That the defendant is a corporation of Indiana and a citizen and resident of that state, and of that state only, and is a non-resident of the State of Kenucky, and is not now doing and never has done any business therein. That the defendant at the time of the occurrences set forth in the plaintiff's petition and at the institution of that action and continuously since said dates, was and has been
9 engaged in the performance of the contract entered into by it with the United States Government, as evidenced by a written instrument executed by its Secretary of War, and which contract calls for the erection and construction of a certain lock, dam and canal referred to in the petition of the plaintiff, Haines, and which is exclusively located and situated *in* a certain tract of land on the Ohio River near the City of Louisville, Kentucky, and which was acquired by the United States of America by purchase or condemnation by and with the consent of the Legislature of Kentucky, and over which territory the United States of America had and has exclusive jurisdiction and control. That each and every part of the work and labor performed by said defendant pursuant to said contract, and which is the only work or labor or contract performed by it in or near the Commonwealth of Kentucky, is executed and performed entirely and exclusively, save as hereinafter set forth, within and upon the aforesaid tract of land. That in the performance and execution of each and every portion of said contract and of the work and labor incident thereto, said defendant is without discretion in the premises but is arbitrarily bound, directed, regulated and controlled by the terms of the said contract with the United States of America as interpreted and enforced by its engineers and agents upon said tract of land and acting through its War Department. That the only work or labor now or at any time performed by said

defendant outside of said tract of land, consists and consisted
10 in dumping certain dirt and rocks dredged by it from within said tract of land upon certain land in the Commonwealth of Kentucky controlled by the Kentucky & Indiana Terminal Railway Company, and which said dumping is, and always has been effected pursuant to written permission granted therefor by said Terminal Railway Company to the United States of America, and for which said dumping privilege no consideration, of any kind or description, passes, or ever has passed, to or from either said defendant or said Terminal Railway Company, or the Government of the United States. That the accident and injury set out in the petition of the said Haines, and each and every individual and instrumentality, either directly or indirectly connected therewith, was each of them located within and upon said Government Reservation and not within or upon any territory controlled by the Commonwealth of Kentucky, or the courts thereof. That the original summons issued upon said plaintiff's petition, was served by the deputy sheriff of Jefferson County upon one C. H. Wright as the agent of this defendant while said deputy sheriff and said Wright were each of them standing within and upon any territory controlled by the Commonwealth of Kentucky or the courts thereof. That the second or alias summons issued upon said petition was served upon the said Wright while he was at his home in Louisville, Kentucky, and engaged in his private affairs, and not engaged in any business or agency of any kind whatever, for or on behalf of said defendant.

Thereupon the defendant, Haines, filed his reply, in which
11 he denied the material allegations of the said paragraph of the said answer, but subsequently withdrew same and substituted therefor his general demurrer, which was sustained by the Jefferson Circuit Court and an order was thereupon entered by said Court that it has jurisdiction to hear and determine the question of negligence and injury complained of in the petition of said Haines, and said — of action was assigned for trial to March, 1916.

A transcript of the record of the Jefferson Circuit Court in said cause down to and including the order of September 18, 1915, which was the order filing the special demurrer to the petition of the said Haines, was filed in this Court as "Exhibit A" with your petitioner's original petition for a writ of prohibition, and reference is hereby made to said Exhibit. A transcript of the record of the proceedings in the Jefferson Circuit Court had subsequent to said order of September 18, 1915, is filed herewith and marked "Exhibit B."

Wherefore, your petitioner prays that this Court issue its Writ of Prohibition addressed to the respondent, The Honorable Thomas R. Gordan, wherein it commands and directs him to proceed no further with and to enter no further order in said action at law, No. 86285, and now pending before him, until this petition may be heard and determined, or until the further orders of this Court; and your petitioner further prays for its costs herein, and for all other relief to which it may appear entitled.

12 J. P. HOBSON & SON,
RICHARDS & HARRIS,
Attorneys for Petitioner.

W. O. Harris, Jr. says that he is a member of the Jefferson County, Bar, and as such is one of the attorneys representing the petitioner herein. That the Ohio River Contract Company is a non-resident corporation, all of whose officers are absent from this state, and that the statements contained in the foregoing petition are true, to the best of his knowledge and belief.

W. O. HARRIS, JR.

Subscribed and sworn to before me by W. O. Harris, Jr. this 23rd day of February, 1916. My commission expires January 23rd, 1917.

S. G. CONNAUGHTON,
Notary Public, Jefferson County, Kentucky.

Endorsed: 1916 February 25th filed. R. W. Keenon, C. C. A.

13 The motion referred to in the foreging order is as follows:

Court of Appeals of Kentucky.

THE OHIO RIVER CONTRACT COMPANY, Petitioner,
v.
Honorable THOMAS F. GORDAN, Judge of the Jefferson Circuit Court, Common Pleas Branch, Second Division, Respondent.

Motion.

The petitioner, the Ohio River Contract Company, appears by counsel and moves the Court for leave to file the accompanying Petition for a Writ of Prohibition against the Honorable Thomas R. Gordan, Judge of the Jefferson Circuit Court, Common Pleas Branch, Second Division; and

Petitioner further moves the Court to enter an order restraining the said, The Honorable Thomas R. Gordan, from proceeding further with, or from entering any further order in a certain action at law now pending before him as Judge of the Jefferson Circuit Court, Common Pleas Branch, Second Division, which is No. 86285, and wherein one John J. Haines is plaintiff and this petitioner and one Fred Swisher are defendants, and until the prayer of said Petition for a Writ of Pr-hibition can be heard and determined.

14 J. P. HOBSON & SON,
RICHARDS & HARRIS,
Attorneys for Petitioner.

Endorsed: 1916 February 25, filed. R. W. Keenon, C. C. A.

The notice referred to in the foregoing order is in words and figures as follows:

Court of Appeals of Kentucky.

THE OHIO RIVER CONTRACT COMPANY, Petitioner,
v.
Honorable THOMAS R. GORDAN, Judge of the Jefferson Circuit Court, Common Pleas Branch, Second Division, Respondent.

Notice.

Honorable THOMAS R. GORDAN, Judge of the Jefferson Circuit Court, the 25th day of February, 1916, at the session of the Court of Appeals of Kentucky held at Frankfort on that day, the Ohio River Contract Company, will move the Court that it be allowed to file therein its petition for a Writ of Prohibition, a copy of which petition is attached to this notice, and will at the same time move
15 said Court to restrain the said, The Honorable Thomas R. Gordan, from proceeding further with, or from entering any further order in an action at law now pending before him as Judge of the Jefferson Circuit Court, Common Pleas Branch, Second Division, and which said action is No. 86285, wherein one John J. Haines is plaintiff and the Ohio River Contract Company and Fred Swisher are defendants, and until the Court of Appeals shall have passed upon the prayer of the said petition.

RICHARDS & HARRIS,
Attorneys for Petitioner.

Sh'r'ff's Return.

Executed Feb'y 23rd 1916, on Honorable Thomas R. Gordan by delivering to him a copy of the within notice.

C. J. CRONAN, *S. J. C.*
By J. A. LUDWIG, *D. S.*

Endorsed: 1916 February 25, filed. R. W. Keenon, C. C. A.

16 The parts of Exhibits "A" and "B" called for in the Pra'cipe filed by the Plaintiff in Error and referred to in the petition are as follows, to-wit:*

The said exhibits, are both endorsed, February 25th, 1916. Filed. Rodman W. Keenon, C. C. A.

17 #86285.

STATE OF KENTUCKY,
County of Jefferson:

Pleas before the Hon. Thos. R. Gordon, Judge of the Jefferson Circuit Court, Common Pleas Branch, Second Division, at the Court House, in the City of Louisville, State and County aforesaid, and at the times and dates hereinafter mentioned.

JOHN J. HAINES, Plaintiff,
vs.
OHIO RIVER CONTRACT COMPANY and FRED SWISHER, Defendants.

TRANSCRIPT OF RECORD.

18 Be it remembered, that heretofore, to-wit, on the 30th day of July, 1914, came Plaintiff, by counsel, and filed his Petition herein.

Said Petition is in words and figures as follows, to-wit:

Jefferson Circuit Court, Common Pleas Branch, — Division.

JOHN J. HAINES, Plaintiff,
vs.
OHIO RIVER CONTRACT COMPANY and FRED SWISHER, Defendants.

Petition.

The plaintiff, John J. Haines, states that the defendant, Ohio River Contract Company, is a corporation, created by and organized under the laws of the State of Indiana, and at all times herein named this corporation had power to sue and be sued, contract and be contracted with, and to transact business in Kentucky,
19 and was engaged, at all times herein named in making certain excavations in the banks of the Ohio River near Twenty-seventh Street, in Louisville, Kentucky, and was preparing to construct a new lock at or near said place.

Plaintiff further states that the defendant, Fred Swisher, is a citizen and resident of Louisville, Kentucky, and at all times herein named, and while engaged in the week hereinafter specified, on behalf of the defendant company, was an employe and servant of the defendant company, in the capacity of craneman, and engaged in operating a crane, which is a part of a device, known as a "boom," commonly used, with its various appliances, in lifting loads of rock from the river and depositing such loads into boats or barges, known as "scows."

Plaintiff states that on and prior to February 28th, 1914, the plaintiff, John J. Haines, was employed by the defendant, Ohio River Contract Company, and on said day was ordered and directed by the said Company, its officers and agents, superior in authority

and control to the plaintiff, and whose orders and directions he was required to obey, to station himself upon a certain scow, situated alongside of a dredge boat at the place heretofore names, and to observe and look after the proper loading of the rock into said
20 scow. Plaintiff states that, for the purposes of unloading said rock into said scow, the defendant company was using and employing a contrivance, known as a "boom," which consisted, among other things, of a large dipper or bucket, used to contain rock, and an appliance known as a dipper stick or bucket stick, attached to the boom, and that all of said appliances were moved from place to place by means of engines, located on the dredge boat, the said engine and dredge boat being owned by the company, and the said engine operated by its engineer; and plaintiff states that, in the prosecution of said work of removing said rock from the river bank and depositing the same in the scow, by the use of said dipper or bucket, plaintiff was always required to be in close proximity to said bucket or dipper, when the said load of rock was lifted and swung out over the said scow, for the purpose of being dumped therein; that he was required and directed, and under his employment, to see that all the rock, contained in said dipper or bucket, was removed therefrom and deposited in the scow at a proper place.

Plaintiff states that the defendant, Ohio River Contract Company, its agents and servants, by and through their gross negligence, permitted the engines and parts thereof, located upon its dredge
21 boat aforesaid, to become and remain in a defective and dangerous condition in these respects: that the throttle valve and other parts, used in connection therewith, on the said engine, was worn and old and leaking, so that it was difficult and impossible for the engineer in charge thereof to control the movements of the boom and often times, by reason of said dangerous and defective condition of said engines, said boom and appliances thereto, including the dipper stick, would move or jerk or lurch, without being caused to be moved by any act on the part of the engineer, and that the said boom and the dipper stick and dipper were thereby rendered defective and dangerous, because the said appliances would often move suddenly and without warning, and without being moved or controlled by the engineer in charge of said engine, and the said movements of the said boom and dipper stick and dipper or bucket were thereby rendered irregular, uncertain and dangerous.

Plaintiff states that the defendant company, its agents and servants, as aforesaid, knew, or, by the exercise of ordinary care, could have known of the dangerous and defective condition of the engine and appliances thereof, and the plaintiff did not know and could not, by the exercise of ordinary care, have known of said de-
22 fective and dangerous condition of said engine and appliances.

Plaintiff states that on February 28th, 1914, while he was standing upon said scow and engaged in the work aforesaid, under his employment with the defendant company, and after a load of rock had been lifted from the river bank in the said dipper or bucket, by means of said boom, and swung out over the said scow, and while

the said bucket or dipper was in close proximity to where the plaintiff was standing, the said dipper or bucket was, because and by reason of the joint and concurring gross negligence of the defendant company, its agents and servants as aforesaid, in maintaining a defective and dangerous engine and appliances to said engine, which controlled the movements of the said boom and dipper stick and dipper, and because and by reason of the gross negligence of the defendant, Fred Swisher, in managing and controlling the action and movements of the said dipper and dipper stick, caused to collide with and to strike, with great force and violence, the head and face of the plaintiff and to break his jaw bone, to knock out certain teeth and to injure the structure of many others, to inflict cuts, wounds and bruises upon his face and head and to produce
stock and injury to his nerves and nervous system, and the
23 plaintiff was thereby caused to suffer, has since continuously suffered and will always suffer great pain of body and mind, and that all of said injuries are permanent, and will permanently deprive the plaintiff of his power and capacity to labor and earn money, to his damage in the sum of Thirty Thousand Dollars ($30,000.00).

Wherefore, Plaintiff, John J. Haines, prays judgment against the defendants, Ohio River Contract Company and Fred Swisher, and each of them, for Thirty Thousand Dollars ($30,000.00) in damages, for his costs herein and for all other proper relief.

O'DOHERTY & YONTS,
Counsel for Plaintiff.

The plaintiff, John J. Haines, says that the statements of the foregoing petition are true.

J. J. HAINES.

Subscribed and sworn to before me by John J. Haines, this 30th day of July, 1914.

My commission expires January 22nd, 1916.

OLIVE DRAZEL,
N. P., Jeff. Co., Ky.

24 Thereupon the Clerk issued Summons and Two (2) Copies. which said summons is as follows, to-wit:

Jefferson Circuit Court.

The Commonwealth of Kentucky to the Sheriff of Jefferson County, Greeting:

We command you to summon Ohio River Contract Company and Fred Swisher 86285 to answer a petition filed against them in our Jefferson Circuit Court, by John J. Haines and warn them that upon failure to answer within twenty days after service hereof, if in Jefferson County, or within thirty days if elsewhere in the State, judgment may be rendered by default, or answer compelled, or

proof taken at petitioner's option; and make due return of this summons within sixty days from the date hereof.

Witness, Louis Summers, Clerk of said Court, this 30th day of July, 1914.

LOUIS SUMMERS, *Clerk*,
By GEO. P. BUTLER, *D. C.*

The foregoing Summons bears the following Sheriff's Return on the back thereof, to-wit:

25 Came to hand July 31, 1914, at 10 A. M.
Executed Aug. 4th, 1914 on Fred Swisher, by delivering to him a copy of the within summons.

C. J. CRONAN, *S. J. C.*,
By TOM DUDDY, *D. S.*

Executed Aug. 4th, 1914 on Ohio River Contract Company by delivering a copy of the within summons to C. H. Wright, Supt. of said Company, he being chief officer found in this county at this time.

C. J. CRONAN, *S. J. C.*,
TOM DUDDY, *D. S.*

At a Court held on the 19th day of March, 1915.

Came the defendants by counsel, and enter their special appearances herein.

Came the defendants by counsel, and moved the Court on a written motion filed to quash the return on the summons herein to which the plaintiff objects.

26 It is ordered by the Court that this said motion be assigned to March 23rd, 1915 at 9 A. M. for hearing.

Came the plaintiff by counsel and filed a written notice herein.

Came the plaintiff by counsel and filed the deposition of W. A. Taylor herein.

Came the plaintiff by counsel and moved the court to permit him to recross examine the witness, W. A. Taylor herein, to which the defendants object.

Came the plaintiff by counsel and filed the affidavit of John J. Haines in support of said motion.

It is ordered that said motion be assigned to March 23rd, 1915, at 9 A. M.

Said Written Motion to Quash filed on the 19th day of March, 1915, is as follows, to-wit:

Jefferson Circuit Court, Common Pleas Branch, Second Division.

27 JOHN J. HAINES, Plaintiff,
v.
OHIO RIVER CONTRACT COMPANY and FRED SWISHER, Defendants.

Motion to Quash.

Comes the defendants, Ohio River Contract Company, and Fred Swisher, by counsel, and moved the Court to quash the return on the summons herein.

A. B. BENSINGER,
RICHARDS & HARRIS,
Attorneys for Plaintiff.

28 At a court held on the 26th day of March 1915.
Came the plaintiff by counsel and filed the affidavit of M. K. Yonts, herein, together with two exhibits.

29 Said Affidavit of M. K. Yonts filed on the 26th day of March, 1915, is as follows, to-wit:

Jefferson Circuit Court, Common Pleas Branch, Second Division.

JOHN J. HAINES, Plaintiff,
vs.
OHIO RIVER CONTRACT COMPANY and FRED SWISHER, Defendants.

Affidavit.

Affiant, Morton K. Yonts, states that he is one of the counsel for the plaintiff in this action, and that heretofore to-wit: on the 11th day of November, 1914, the Ohio River Contract Company furnished to the Secretary of the State of Kentucky, and filed in his office a statement of the Ohio River Contract Company which in substance showed: That said Company was a corporation of the State of Indiana and was then doing business in said State, and also, at Lock No. 41, 31st & River, Government Reservation, at Louisville, Ky., and in said statement furnished and filed,
30 as aforesaid, designated Clarence H. Wright of Louisville, Ky., of said corporation, as the Agent upon whom process may be served in any suit that might be brought against said corporation in the State of Kentucky, and that all of said facts are shown by a statement in writing from C. F. Crecelius, Secretary of State of the Commonwealth of Kentucky, under date of March 25th, 1915, which said certificate of said statement of said corporation is filed with and made a part of this affidavit.

Affiant further states that at the time of the summons herein, August 4th, 1914, Clarence H. Wright and Fred Swisher were each residents of and domiciled in Jefferson County, Kentucky.

MORTON K. YONTS.

Subscribed and sworn to before me by Morton K. Yonts, on this the 26th day of March, 1915.

My commission expires January 22nd, 1916.

WILLIAM A. ROSENFIELD,
Notary Public, Jefferson Co., Ky.

31 Said Two Exhibits filed with the foregoing Affidavit are as follows, to-wit:

Statement of Corporation.

(To be filed in the Office of the Secretary of State before doing business in this State.)

To the Secretary of State, Frankfort, Ky.

SIR: Notice is hereby given that the place of business for the Ohio River Contract Company, a corporation of the State of Indiana in Kentucky is a- Lock No. 41, 31st and the River, Government Reservation, Louisville, Ky. and that Clarance H. Wright, of Louisville, Ky. is our agent thereat, upon whom process may be served in any suit that may be brought against our Company within the State of Kentucky.

Done at Evansville, Ind. this 11th day of Feby. 1914.

—— ——, *President.*
LESLIE D. EICHEL, *Secretary.*

This Statement may be signed by President or Secretary.

Fill in and return to Secretary of State with $1.00 recording fee.

32 Filed & Recorded, February 13th, 1914.

Commonwealth of Kentucky.

Office of the Secretary of State.

Certificate.

I, C. F. Crecelius, Secretary of State for the Commonwealth of Kentucky, do certify that the foregoing writing has been carefully compared by me with the original record thereof, now in my official custody as Secretary of State and remaining on file in my office, and found to be a true and correct copy of the Statement of Corporation of The Ohio River Contract Company, filed in this office on February 13th, 1914.

In witness whereof, I have hereunto set my hand.

C. F. CRECELIUS,
Secretary of State.

33 At a court held on the 29th day of March, 1915,

Came the plaintiff by counsel and filed the affidavit of W. W. Downing herein.

Came the defendant by counsel and filed the affidavits of Fred Swisher, C. H. Wright and Tom Duddy herein.

This action having been heard in part upon the motion of the defendants to quash the return on the summons herein, and the court being fully advised, it is ordered that this action be passed to March 30th, 1915, at 9 A. M. for further hearing on said motion, with leave to parties on both sides to file additional affidavits.

34 Said Affidavit of Fred Swisher, filed on the 29th day of March, 1915, is as follows, to-wit:

Jefferson Circuit Court, Common Pleas Branch, Second Division.

JOHN J. HAINES, Plaintiff,
vs.
OHIO RIVER CONTRACT COMPANY and FRED SWISHER, Defendants.

Affidavit.

Affiant states that his name is Fred Swisher and that he is the same person served with summons on August 4, 1914, to answer to the petition filed in the above styled case.

He states that on said day he was employed by the defendant, Ohio River Contract Company, and that his employment was that of operation of a portion of an apparatus known as a steam shovel, and which said shovel was located at the bottom of a cut or canal bed hereinafter described; that the said cut or canal bed and the land for some distance to the south thereof, were situated or located in a tract of land exclusively owned and controlled by the
35 United States government, and which said land was not within the state of Kentucky.

Affiant states that he was served with the said summons on August 4, 1914, at or about the hour of 1 P. M., that at the time he was served with said summons he was in and upon the said tract of land exclusively owned and operated by the United States government and known as the government reservation, to-wit: at or about a spot where the tracks were located leading from the top of the embankment down to the bottom of the said cut or canal bed, which said tracks were used for hoisting the cars filled with the rock and dirt removed from the bottom of said cut or canal bed to the top of said embankment.

Affiant states that at the time he was served with said summons, as aforesaid, he was not within the state of Kentucky, but was within the government reservation, as aforesaid.

Affiant states that on August 4, 1914, there were not such tracks as described and there was no shed containing hoisting engines used to hoist the cars above described, and there were no hoisting engines, of any kind, on any land except the aforesaid tract exclusively
36 owned and operated by the United States government; that there were no such tracks or hoisting engines located near

the said canal on any land within the State of Kentucky, or within its jurisdiction.

FRED SWISHER.

Subscribed and sworn to by Fred Swisher this 27th day of March, 1915. My commission expires on the 20th day of Janu-ry, 1918.

BECKHAM OVERSTREET,
Notary Public, Jefferson Co., Ky.

Said Affidavit of C. H. Wright filed on the 29th day of March, 1915, is as follows, to-wit:

Jefferson Circuit Court, Common Pleas Branch, Second Division.

JOHN J. HAINES, Plaintiff,
vs.
OHIO RIVER CONTRACT COMPANY and FRED SWISHER, Defendants.

Affidavit.

37 Affiant states that his name is C. H. Wright and that he is the same C. H. Wright who was served Ausgust 4, 1914, with summons to appear and answer to the petition filed in this case.

He states that he is superintendent of the Ohio River Contract Company for the work hereinafter mentioned, to-wit: the performance of a contract entered into by and between the United States Government by its duly authorized engineers, and the Ohio River Contract Company, which said contract calls for the erection and construction of a canal and its appurtenances.

He states that the Ohio River Contract Company is a corporation organized by and existing under the laws of the state of Indiana, and that it is not a corporation organized by or existing under, and is not a citizen or resident of the State of Kentucky. He states that said corporation is not doing business in Kentucky; that the only work or business which said corporation is doing near the state of Kentucky is in the performance of the aforesaid contract with the United States government; that the aforesaid work which the said corporation is doing near the state of Kentucky, is done upon a certain tract of land acquired by the United States government by purchase or condemnation, and with the consent of the Com-
38 monwealth of Kentucky, which said tract of land is under the exclusive jurisdiction of the United States government; that the work and business which the Ohio River Contract Company is performing near the state of Kentucky, is limited to the aforesaid work done upon the said tract of land owned and controlled by the United States government and known as the government reservation; that this is the only work or business which said corporation is doing near the state of Kentucky, and that it is not doing any work or business in said state.

Affiant states that he was served with the aforesaid summons on

August 4, 1914, at or about the hour of 1 P. M.; that at said time he was, to the best of his recollection, within the aforesaid land or territory exclusively owned and controlled by the United States government, to-wit: at or about the spot where the shed containing the hoisting engines is located; that said hoisting engines referred to are used to haul up the side of the embankment and from the bottom of the cut or canal bed, the rock, dirt and other debris removed therefrom by the steam shovels placed and operated in the bottom of said cut or canal bed by the Ohio River Contract Company.

39 He states that the said spot near the said shed containing the said hoisting engines, upon which said spot he was standing when served with the summons as aforesaid, was in and upon the said tract of land exclusively owned and operated by the United States government and known as the government reservation; that said spot is not within the state of Kentucky.

He states that there are no stationary engines of any kind near the said canal, which were on August 4, 1914, on any land situated outside of the said government reservation or inside the state of Kentucky.

C. H. WRIGHT.

Subscribed and sworn to before me by C. H. Wright, this 27th day of March, 1915. My commission expires on the 20th day of January, 1918.

BECKHAM OVERSTREET,
Notary Public, Jefferson County, Ky.

Said Affidavit of Tom Duddy filed on the 29th day of March, 1915, is as follows, to-wit:

40 Jefferson Circuit Court, Common Pleas Branch, Second Division.

JOHN J. HAINES, Plaintiff,
vs.
THE OHIO RIVER CONTRACT CO. and FRED SWISHER, Defendants.

Affidavit.

Affiant states that his name is Tom Duddy; that on August 4th, 1914, he was acting as Deputy Sheriff of Jefferson County; that he is the officer that served the summons and made the return thereon upon C. H. Wright and Fred Swisher in the above styled action.

He states that the place where and the manner in which he served the said summons and the circumstances surrounding same to the best of his recollection is and are as follows, to-wit: That on said date he went North on Twenty-seventh Street to a point where the Ohio River Contract Company was at work on the United States Government Canal. He states that he walked North on said street

past the saloon and under the railroad trestles and proceeding
41 North walked up the wooden steps leading to the top of the fill at that place. Upon reaching the top of the steps affiant proceeded in a Northwesterly direction, that is, towards the river but bearing towards his left until he reached the timekeeper's shack. He inquired at the timekeeper's shack for C. H. Wright and Fred Swisher and was informed in the shack that Mr. Wright had gone to lunch and that Swisher did not come on until one o'clock. Thereupon affiant proceeded back East until he reached a spot on the side of the embankment where the tracks for the hoisting cars were then located. He waited at that point just a few feet west of those two tracks until Swisher came and served Swisher at that point right at the top of the hill as Swisher was on his way to work. This was the hill leading down into the cut where the Ohio River Contract Company was then working with some steam shovels loading cars. Affiant then proceeded East until he reached a spot a little bit south-east of the shed where the hoisting engines were and he there encountered C. H. Wright who was coming down the track. At this spot he served the summos*n* upon Wright by handing to him a true copy thereof.

TOM DUDDY.

42 Subscribed and sworn to before me by Tom Duddy this 27th day of March, 1915.

My commission as Notary Public will expire Feb. 16, 1916.

CLARENCE E. WALKER,
Notary Public Jeff. Co., Ky.

On the 29th day of March, 1915, the Clerk issued the following Alias Summons and Two (2) Copies, to-wit:

Jefferson Circuit Court.

The Commonwealth of Kentucky to the Sheriff of Jefferson County, Greeting:

We command you to summon Ohio River Contract Company and Fred Swisher #86285 to answer a petition filed against them in our Jefferson Circuit Court, by John J. Haines and warn them that upon failure to answer within twenty days after service here, if in Jefferson County, or within thirty days if elsewhere in the State, judgment may be rendered by default, or answer compelled, or proof taken at petitioner's option; and make due return of this summons within sixty days from the date hereof.

Witness, Louis Summers, Clerk of said Court, this 29th day of March, 1915.

LOUIS SUMMERS, *Clerk*,
By GEO. P. BUTLER, *D. C.*

43 The foregoing Alias Summons bears the following Sheriff's Return on the back thereof, to-wit:

Came to hand March 29th, 1915, at 2:50 P. M.

Executed March 29th, 1915, on Ohio River Contract Company by delivering a copy of the within summons to C. H. Wright, Supt. of said Company he being chief officer found in this county at this time.

C. J. CRONAN, *S. J. C.*,
By L. E. JARVIS, *D. S.*

Executed March 29th, 1915, on Fred Swisher by delivering to him a copy of the within summons.

C. J. CRONAN, *S. J. C.*,
By L. E. JARVIS, *D. S.*

44 At a Court held on the 1st day of April, 1915.

Came the defendants by counsel and filed the affidavits of John C. Oakes, Sloan Graff, and C. H. Wright.

It is ordered by the court that this action be passed to April 12th, 1915, at 9 A. M.

Said affidavit of John C. Oakes filed on the 1st day of April, 1915, is as follows, to-wit:

Jefferson Circuit Court, Common Pleas Branch, Second Division.

JOHN J. HAINES, Plaintiff,
v.
OHIO RIVER CONTRACT COMPANY and FRED SWISHER, Defendants.

Affidavit.

Affiant states that his *is* name is John C. Oakes and that he is a Major in the United States Army, Corps of Engineers, and
45 that he is the District Engineer Officer in charge of the work hereinafter mentioned.

He states that he is familiar with the work which is being performed by the Ohio River Contract Company on the United States government canal on the Ohio River near Portland, Louisville, Kentucky. He states that the said work is being done pursuant to a contract entered into by and between said Ohio River Contract Company and the United States government, through its duly authorized officers of engineers; that said work is exclusively done and performed in an- upon a tract of land acquired by the United States government by purchase of condemnation and with the consent of the Commonwealth of Kentucky, which said tract of land is known as the Government Canal Reservation and is under the control of the United States government.

Affiant states that all of the benefits arising from the performance of the said contract inure to the benefit of the United States government, and to the benefit of that government only, and to the benefit

of no other firm, corporation, association or individual, save as hereinafter mentioned; he states that in so far as he or the office of which he is in charge, to-wit: the United States Engineer's office,
46 knows, no individual, firm, corporation or association, is in any way whatever interested in the said contract or the work performed thereunder, except the said Ohio River Contract Company, the contractor performing same.

Affiant states that the said work of erecting and constructing the said government canal and appurtenances and all the work connected therewith, in all of its details, was and is designed and determined by the duly authorized agents of the United States government and that no discretion was or is exercised by the said Contract Company in the performance of the said contract and work, but that said Contract Company was and is bound by the specifications and contract fixed and determined by the United States Government, as aforesaid; that the duties of the said corporation under the said contract, were and are strictly limited to the bare execution of the work as determined by the United States government specifications. Affiant states that the actions and the work of the said Contract Company and all of its agents and employes engaged in the performance of the aforesaid contract, were and are, and always have been, and always will be, during the life of the said contract, under the constant and direct supervision and control of the United States government engineers and other officials present at the place of the said work and in supervision thereof.

47 Affiant states that the performance of no part of said contract entered into by and between said Contract Company and the United States government requires any work or labor, of any kind whatever, to be done outside of or beyond the limits of the aforesaid Government Canal Reservation.

JOHN C. OAKES,
Maj. Corps of Enges. U. S. Army.

Subscribed and sworn to before me by John C. Oakes, this 31st day of March, 1915. My commission expires.

MARY C. ROBERTS,
Notary Public, Jefferson County, Ky.

My commission expires February 9, 1918.

Room 308 Custom House, Louisville, Ky.

Said Affidavit of Sloan Graff filed on the 1st day of April, 1915, is as follows, to-wit:

Jefferson Circuit Court, Common Pleas Branch, Second Division.

JOHN J. HAINES, Plaintiff,
vs.
OHIO RIVER CONTRACT COMPANY and FRED SWISHER, Defendants.

Affidavit.

48 Affiant states that his name is Sloan Graff and that he — employed by the Ohio River Contract Company, and was so employed on Feb'y 28, 1914, and continuously since said date, in the capacity of timekeeper for said corporation; that his duties as such require that he be familiar with the general nature and location of the work performed by said corporation; that the only work which the said corporation is performing near the State of Kentucky is that of constructing and erecting a canal on the Ohio River, and for the exclusive use and benefit of the United States government and pursuant to a contract entered into by and between said Contract Company and the United States government.

Affiant states that the Ohio River Contract Company is a corporation organized by and existing under the laws of Indiana and not organized by or existing under the laws of Kentucky, and is not a citizen or resident of Kentucky.

Affiant states that all of the work done by the said Contract Company and all of its instrumentalities and employes used in the performance of said work and said contract on Feb'y 28, 1914, and continuously since said date, were and are in and upon a
49 certain tract of land acquired by the United States government by purchase or condemnation, with the consent of the Commonwealth of Kentucky, which said tract is known as the Government Canal Reservation. Affiant states that he is familiar with the circumstances surrounding the accident and the injury alleged in this plaintiff's petition, and he states that said accident and the said injury, if any, and all of the individuals and instrumentalities in any way connected therewith, were, at the time, in and upon the said tract of land known as the Government Canal Reservation and more particularly were upon a boat or boats floating upon the Ohio River, which is a navigable stream.

Affiant states that each and every office and all clerical force maintained by the Ohio River Contract Company near the State of Kentucky, is and was, on Feb'y 28th, 1914, and continuously since said date, in and upon the United States Government Canal Reservation, as aforesaid, and that none such are or were maintained by said Contract Company within the State of Kentucky.

Affiant states that all of the work done by the said Contract Company, and all of its instrumentalities and employes and all of its offices and clerical force used in the performance of the
50 said work and in the performance of the contract aforesaid, have always been in and upon the aforesaid Government Canal Reservation since the said Contract Company commenced

work under the said contract. Affiant states that at no time has the said Ohio River Contract Company been a citizen of, or done any business in the State of Kentucky.

SLOAN GRAFF.

Subscribed and sworn to before me by Sloan Graff this 31st day of March, 1915. My commission expires January 23, 1918.

S. G. CONNAUGHTON,
Notary Public, Jefferson County, Kentucky.

Said Affidavit of C. H. Wright filed on the 1st day of April, 1915, is as follows, to-wit:

Jefferson Circuit Court, Common Pleas Branch, Second Division.

JOHN J. HAINES, Plaintiff,
vs.
OHIO RIVER CONTRACT COMPANY and FRED SWISHER, Defendants.

Affidavit.

51 Affiant states that his name is C. H. Wright and that the facts herein stated are supplementary to the facts heretofore stated by this affiant in his affidavits previously filed herein.

He states that the work in which the Ohio River Contract Company is now engaged, and was engaged on August 4, 1914, and on all of the dates and times mentioned in this plaintiff's petition, which said work is the only work it had been engaged in near State of Kentucky, was pursuant to the contract entered into by and between the Ohio River Contract Company and the United States of America, as set out in affiant's former affidavits, inured to the benefit of the United States government, and to the benefit of that government only; that said work and all its details was designed and determined by the duly authorized agents of the United States government and that no discretion was exercised by the Ohio River Contract Company in the performance of said work, but that said corporation was bound by the discretions and specifications determined by the United States government; that the duties of the said corporation under said contract were limited to the bare execution of the work determined by the United States government.

52 Affiant states that the Commonwealth of Kentucky had no interest in or control over the work mentioned in said contract, nor in the performance of the said contract of any kind or description whatsoever.

Affiant states that no citizen or resident of Kentucky had any interest in or control over the said work or of the performance of the said contract.

Affiant states that he witnessed the accident set out in the plaintiff's petition and inaccurately described therein, and that the said accident and the injury therein alleged, if any, occurred in its

entirety upon the tract of land referred to in affiant's former affidavits and which was under the exclusive jurisdiction and control of the United States of America, and more particularly upon a boat floating upon the Ohio River, which is a navigable stream.

Affiant states that at the time of the said accident and said injury, if any, the plaintiff, together with each and every agent or employe of the Ohio River Contract Company, including the defendant, Fred Swisher, and also each and every piece of machinery or other instrumentality in any way connected with the said accident and injury, if any, was, each and all of them,
53 upon the said government reservation, and more particularly upon the said boat or boats floating upon the said Ohio River.

Affiant further states that each and every piece of work, of every kind and description, done or performed by the Ohio River Contract Company in the execution and performance of the aforesaid contract upon the aforesaid government reservation, is now done, and was on August 4, 1914, and on all of the times mentioned in this plaintiff's petition, done under the direct and constant supervision of engineers and officials employed and appointed by the United — government.

Affiant states that the actions of the said Contract Company and all of its agents and employes engaged in the performance of the aforesaid contract, are now and were at all of the aforesaid times under the constant and direct supervision and control of the United States government engineers and officials.

C. H. WRIGHT.

Subscribed and sworn to before me by C. H. Wright, this 30th day of March, 1915. My commission expires January 23rd, 1918.

S. G. CONNAUGHTON,
Notary Public, Jefferson County, Kentucky.

54 At a Court held on the 12th day of April, 1915.

Came the plaintiff, by counsel, and filed the affidavits of John J. Haines and R. F. Wharton herein.

Came the defendants by counsel and filed the affidavit of Jacob Eichel herein.

Said Affidavit of John J. Haines filed on the 12th day of April, 1915, is as follows, to-wit:

Jefferson Circuit Court, Common Pleas Branch, Second Division.

JOHN J. HAINES, Plaintiff,
vs.
OHIO RIVER CONTRACT COMPANY and FRED SWISHER, Defendants.

Counter-Affidavit.

The affiant, John J. Haines, for counter-affidavit herein, states that it is not true as stated in the affidavits of Sloan Graff that "at

no time has the said Ohio River Contract Company been a citizen of or done any business in the State of Kentucky," nor is it true as stated in the affidavit of Major John C. Oakes, "that the per-
55 formance of no part of said contract entered into by and between said Contract — and the United States Government requires any work or labor of any kind whatever to be done outside of or beyond the limits of the aforesaid Government Canal Reservation."

Affiant further states that before and after the accident to the plaintiff herein, the Ohio River Contract Company was engaged in work and business in the State of Kentucky, and laid and placed tracks on land owned by the Kentucky and Indiana Bridge and Railroad Company, in Jefferson County, for the purpose of conveying certian cars thereof, which were loaded with dirt and rock, taken and removed from the property and premises, known as the United States Government and Canal Reservation.

Affiant further states that said earth and rocks and other like substances were removed from the said premises of the United States Government Canal Reservation, and placed on the property and premises of the Kentucky and Indiana Bridge and Railroad Company, under an agreement or arrangement between the said Ohio River Contract Company and the Kentucky and Indiana Bridge and Railroad Company, the terms of which said agreement or understanding or contract are unknown to this affiant.

56 Affiant further states that the said rocks and earth and other like substances so removed from the premises of the United States Government Canal Reservation, were removed in performing and executing the contract between the United States of America and the said Ohio River Contract Company.

Affiant further states that the said tracks and the said earth and rocks from said Reservation were transported and hauled in the cars and over the tracks owned by the Ohio River Contract Company to the lands of the said Railroad Company *to the lands of the said Railroad Company*, and there deposited, and that said property of said Railroad Company is and was, at all times, within the territorial limits of the State of Kentucky, and affiant further states that the said tracks and appurtenances thereunto are now located as aforesaid, and as originally laid, and are still the property of said Ohio River Contract Company, and still within the territorial limits of the State of Kentucky.

JOHN J. HAINES.

Subscribed and sworn to before me by John J. Haines, this 7th day of April, 1915.

My commission expires January 22nd, 1916.

WILLIAM A. ROSENFIELD,
N. P., Jeff. Co., Ky.

57 Said affidavit of Jacob Eichel filed on the 12th day of April, 1915, is as follows, to-wit:

Jefferson Circuit Court, Common Pleas Branch, Second Division.

JOHN J. HAINES, Plaintiff,
vs.
OHIO RIVER CONTRACT COMPANY and FRED SWISHER, Defendants.

Affidavit.

Affiant states that his name is Jacob Eichel; that he is a citizen and resident of Evansville, Indiana; that he is the chief stockholder in, and holds the position of General Manager in the Ohio River Comtract Company.

He states that the Ohio River Contract Company is a corporation organized by and existing under the laws of Indiana, and is, and always has been a citizen and resident of that State. He states that it is not and never has been a citizen or resident of the State of Kentucky. He states that said Contract Company is not now, nor was it at any of the times set out in this plaintiff's petition, doing nor has it ever done, business in the State of Kentucky, within the usual meaning of that phrase. He states that the chief office,
58 and all of the offices and officers of the said Contract Company, are now, and always have been located and reside in Evansville, Indiana, and at no other place.

Affiant states that the only work which said Contract Company is now doing, or was doing at any of the times mentioned in the plaintiff's petition, and continuously since those times, near the state of Kentucky, is in the execution of a certain contract entered into by and between it and the United States Government, whereby it is erecting for the exclusive use and benefit of said Government a certain canal in and upon the Ohio River, a navigable stream, and that each and every part of the labor and work provided for in said contract is done and performed in and upon a certain tract of land exclusively owned and controlled by the United States Government, and known as the Government Canal Reservation, and located in the City of Louisville, Kentucky, and near that portion thereof known as Portland. He states that no work or labor provided for in said contract is done in the State of Kentucky, or at any other place than above set out. He states that at all of the times mentioned in plaintiff's petition and ever since then, said Contract Company has done no business, of any kind, in Kentucky, unless same was
59 performed upon the United States Government Reservation and under a United States Government contract similar to the aforesaid reservation and contract.

Affiant states that for its own convenience and for the convenience of the Kentucky and Indiana Terminal Railway Company, and by and with the permission of said Company it has, from time to time, dumped upon property owned by said Company dirt and rocks, and other like debris, removed by said Contract Company in its excavations upon the aforesaid Government Canal Reservation. He states that for said purpose of dumping said refuse, and for no other purpose whatever, it maintained a short line of temporary track,

over which it ran its dump cars, as aforesaid, upon the land owned by the aforesaid Railway Company.

Affiant states that dumping the debris resulting from its excavations upon United States Government property, as aforesaid, was incidental to and necessary to and expeditious performance and execution of its aforesaid contract with the United States Government. He states that no consideration of any kind whatever, whether valuable or otherwise, was paid by any one to said K. & I. Terminal Railway Company for the privilege of said dumping, nor was any consideration, of any kind whatever, received by said Contract Company therefor.

JACOB EICHEL.

60 Subscribed and sworn to before me by Jacob Eichel this the 10th day of April, 1915.

STELLA BOARDMAN,
Notary Public, J. Co., Ky.

My commission expires January 20th, 1918.

At a court held on the 20th day of April, 1915.

Came the defendants by counsel and filed a written notice herein.

Came the defendants by counsel and moved the court to file the affidavit of Clarance R. Arnold tendered herewith, to which the plaintiff objects.

61 Said Affidavit of Clarence R. Arnold, tendered on the 20th day of April, 1915, is as follows, to-wit:

Jefferson Circuit Court, Common Pleas Branch, Second Division.

JOHN J. HAINES, Plaintiff,
v.
OHIO RIVER CONTRACT COMPANY, Defendant.

Affidavit.

62 Affiant states that his name is Clarance R. Arnold; that he is a resident of Louisville, Kentucky, and is the Secretary in charge of the accounts of the Kentucky & Indiana Terminal Railroad Company (hereinafter referred to as the K. & I.) He states that he is familiar with the facts hereinafter set out.

He states that the K. & I. have heretofore agreed with the Ohio River Contract Company, as hereinafter set out, which said agreement was in force on February 28, 1914, and continuously since said date, and in the following terms and conditions, to-wit:

Said K. & I. has granted to the Ohio River Contract Company its permission to dump upon the grantor's property any refuses or debris removed by said Contract Company from its excavations upon the United States Canal Reservation.

Affiant states that no consideration of any kind whatever is paid by the K. & I. or to the K. & I. to or from any person, firm or cor-

poration, and particularly to or from said Ohio River Contract Company for the aforesaid privilege, or for the dumping of debris therein provided for

63 Affiant says that said agreement and permission is the only contract of any kind whatever, which is now or ever had been in effect between the K. and I. and the said Ohio River Contract Company. He states that the aforesaid dumping of debris is the only operation or activity, of any kind whatever, effected by said Contract Company on any property of the K. & I.

Affiant states that the only tracks, of any description, which are now or ever have been placed or maintained by the said Contract Company on the property of the K. & I. are and were certain temporary tracks laid for the purpose of conveying the dumping carts, and for that purpose only. He states that said tracks were not permanent tracks in any sense of the word, but are shifted from day to day by hand and as the occasion demanded. Affiant states that the only use to which said tracks are or were put is in the execution of the aforesaid permission to dump the debris removed from the Government Reservation.

CLARANCE R. ARNOLD.

Subscribed and sworn to before me by Clarance R. Arnold this 19th day of April, 1915. My commission expires January 23rd, 1918.

S. G. CONNAUGHTON,
Notary Public, Jefferson County, Kentucky.

64 At a Court held on the 26th day of April, 1915. Notice being waived.

Upon motion of the defendant, by counsel, it is ordered by the court that the order of submission herein be set aside.

65 Came the defendants by counsel and tendered and moved the court to file the affidavits of Sloan Graff and C. G. Wright herein, to which the plaintiff objects.

It is ordered that said motion be submitted.

It is ordered by the court that this action be resubmitted on all pending motions.

Said Affidavit of Sloan Graff tendered on the 26th day of April, 1915, is as follows, to-wit:

Jefferson Circuit Court, Common Pleas Branch, Second Division.

JOHN J. HAINES, Plaintiff,
vs.
OHIO RIVER CONTRACT COMPANY and FRED SWISHER, Defendants.

Affiant states that his name is Sloan Graff and that he is the same individual who has filed a former affidavit in this case.

He states that for greater accuracy he states the following facts, to-wit: That his duties familiarize him with the organization of the defendant, Ohio River Contract Company. That the only work

which said defendant is now doing, or on August 4, 1914, or at any of the times set out in plaintiff's petition, was doing, or ever
66 has done in or near the state of Kentucky, is the erection of the canal for the United States Government, as more fully set out in his former affidavit. That said defendant corporation is organized by and is existing under the laws of the State of Indiana, and is now, and always has been a citizen of and resident of that state, and of no other state. That it is not now, and never has been a citizen or resident of Kentucky in any sense of the word.

SLOAN GRAFF.

Subscribed and sworn to before me by Sloan Graff this 22nd day of April, 1915. My commission expires January 23, 1918.

S. G. CONNAUGHTON,
N. P., Jeff. Co., Ky.

Have seen—
Filing objected to.
O'DOHERTY & YONTS.

Said Affidavit of C. H. Wright, tendered on the 26th day of April, 1915, is as follows, to-wit:

67 Jefferson Circuit Court, Common Pleas Branch, Second Division.

JOHN J. HAINES, Plaintiff,
vs.
OHIO RIVER CONTRACT COMPANY and FRED SWISHER, Defendant-.

Affidavit.

Affiant states that his name is C. H. Wright and that he is the same person who has filed former affidavits in this case.

He states that for greater accuracy he states the following facts, to-wit: That the land on which the canal referred to in his former affidavits is now located, and on August 4, 1914, and at all of the times set out in the plaintiff's petition, was located, is, and was exclusively owned and controlled by the United States Government by authority of its acquisition thereof by purchase or condemnation by and with the consent of the Legislature of Kentucky, evi-
68 denced by its acts of August 16, 1892, and in all other of its acts which are relevant.

He states that the defendant, Ohio River Contract Company, was organized under and exists by virtue of the laws of the State of Indiana, and is now, and always has been a citizen and resident of that State, and of no other state. That it is not now, and was not on August 4, 1914, or at any of the times set out in plaintiff's petition, and it never has been doing business in Kentucky, except and unless as more fully appears from the facts set out in the various affidavits filed in this case. That the only work it is now, or on

August 4, 1914, or any of the times set out in plaintiff's petition, was doing, or ever has done in the State of Kentucky, is in the performance of the contract between it and the United States Government, and more fully set out in affiant's former affidavits. That the work which said defendant is now doing and on August 4, 1914, and at all times mentioned in plaintiff's petition was *going*, is and was limited to the performance of said contract and is and was done upon the United States Government Canal Reservation referred to in the other affidavits filed in this case. That *is it* not now
69 and never has done any work in the State of Kentucky. That there are not now and never have been any stationary engines near said canal, except such engines which are, and were, and always have been located in and upon said United States Canal Reservation. That said defendant, Ohio River Contract Company, is now, and always has been bound in its performance of said contract with the United States of America by the specifications furnished by the United States Government Engineers, and has not now, and never has had any discretion in the execution thereof, as more fully appears from affiant's former affidavits.

C. H. WRIGHT.

Subscribed and sworn to before me by C. H. Wright, this 22nd day of April, 1915. My Commission expires January 23rd, 1918.

S. C. CONNAUGHTON,
Notary Public, Jefferson County, Kentucky.

Have seen—
Filing objected to.
O'DOHERTY & YONTS.

70 At a Court held on the 20th day of May, 1915. The parties being present in court by counsel.

Came the defendant by counsel and upon its motion it is ordered that the order of submission herein be set aside.

Came the defendant by counsel and tendered and moved the court to file the affidavit of James C. Oakes herein to which the plaintiff objects.

It is ordered by the court that said motion be submitted.

It is ordered by the court that this action be re-submitted upon all pending motions.

Said affidavit of John C. Oakes tendered on the 20th day of May, 1915, is as follows, to-wit:

Jefferson Circuit Court, Common Pleas Branch, Second Division.

JOHN J. HAINES, Plaintiff,
vs.
OHIO RIVER CONTRACT COMPANY and FRED SWISHER, Defendant-.

Affidavit.

Affiant states that his name is John C. Oakes; that he is a Major on the United States Army, Corps of Engineers, and is the
71 same person who filed his affidavit in this case.

He states that Capt. Lytle Brown, United States Army, Corps of Engineers, was the United States Engineer in charge of all government work in and around Louisville on the 23rd day of March, 1910.

Affiant states that there is now on file in his office as United States Engineer in charge of the erection and construction of a canal for the United States government by the Ohio River Contract Company upon the United States Canal Reservation, near Portland, in the City of Louisville, a letter from the Kentucky & Indiana Bridge & Railway Company to the said Capt. Lytle Brown, wherein said K. & I. Railway Co. granted permission to the United States of America, through its said engineer, to dump upon the property of the said K. & I. Railway Company certain debris, which it was then proposed by the United States government to have removed from the said Canal Reservation, by the contractor who might be awarded the contract for the erection of a Canal for the United States near Portland, Louisville, Kentucky. He states that the said work then in contemplation is the work now being performed by the Ohio River Contract Company of Evansville, Indiana. A copy of said letter is filed with this affidavit marked for identification, "Exhibit A."

72 Affiant states that at the time said letter was written and received the contract for the erection of said Canal had not been awarded to the said Ohio River Contract Company, or to any other firm, corporation or individual. Affiant states that bids for said contract *was* advertised on the 14th day of September, 1911 and that said contract was awarded to the said Ohio River Contract Company on the 14th day of November, 1911.

JOHN C. OAKES.

Subscribed and sworn to before me by John C. Oakes, this 17th day of May, 1915. My commission expires —.

MARY C. ROBERTS,
Notary Public, Jefferson County, Kentucky.

On the 2nd day of August, 1915, the following Endorsement was made on the Wrapper of this case, to-wit: 1915, Aug. 2. This case is submitted upon def'ts mo. to quash the officer's return on both the original & alias summons.

From the affidavits it is manifest that def't Co. was engaged in some degree at least in transacting business in Jefferson Co. at the time — the service of both process-.

73 It is not at all material except as to certain cases which may be later determined, whether the service of first summons was sufficient, in view of the conclusion the court has reached upon the question appearing by answer and other motions. By removal petition in this court appearance was not necessarily entered but by taking steps to have the U. S. Dist. Court adjudge that the individual def't was fraudulently joined, and that, without objection to the service of summons and by further permitting proof to be taken and heard without objection upon that issue and further by filing answer in the Federal Court, joining issue on the allegations of the petition and pleading contributory negligence in the Court's opinion — entered appearance and the def't corporation is clearly before the Court. The service of the alias summons is also sufficient to bring def'ts before the Court.

The larger and perhaps more difficult question, that of jurisdiction of this Court to hear and determine the issue is not involved in this motion and it is not decided.

Mo. of def'ts to quash return on summons is overruled. Ex. for def'ts.

GORDON, *J.*

74 At a court held on the 2nd day of August, 1915.

The court being advised, ordered by the Court that the defendants' motion to quash the return on summons herein be and it is overruled, to which the defendants except.

At a Court held on the 18th day of September, 1915.

This action was set at rules by the plaintiff on the 14th inst.

Came the defendant Ohio River Contract Co. by counsel and enters its special appearances herein and filed a special demurrers to the jurisdiction of this court.

It is ordered by the court that said demurrer be assigned to September 24th, 1915, at 9 A. M.

Came the defendant, Fred Swisher by counsel and enters his special appearance herein and filed a special demurrer to the jurisdiction of this court.

It is ordered by the court that said demurrer be assigned to September 24th, 1915, at 9 A. M.

Said Special Demurrer filed by Ohio River Contract Co. on the 18th day of September, 1915, is as follows, to-wit:

75 Jefferson Circuit Court, Common Pleas Branch, Second Division.

JOHN J. HAINES, Plaintiff,
vs.
OHIO RIVER CONTRACT CO., Defendant.

Special Demurrer.

Comes the defendant, Ohio River Contract Co. by counsel for the sole and single purpose of objecting to the jurisdiction of this Court over its person and over the subject matter of this action and for no other purpose whatever; and filed its special demurrer to the jurisdiction of this Court over its person and also over subject matter of this action and for reason for said demurrer, states that the cause of action herein alleged if any, arose outside of the State of Kentucky and within a tract of land known as the United States Canal R-servation, which tract was within the jurisdiction and under the control of the United States of America, and not of the Commonwealth of Kentucky; and that this defendant at the time said cause of action, if any arose, and at the time when it was served
76 with process by its agent, was, and its said agent, was, *and its said agent was* outside of the State of Kentucky, and within said United States Canal Reservation and was without the jurisdiction or control of the Commonwealth of Kentucky and within the jurisdiction and control of the United States of America.

The foregoing grounds for the demurrer have been enumerated for the purpose of showing on the records certain federal questions raised by this demurrer, but are not exclusive of other grounds for said demurrer.

RICHARDS & HARRIS,
Att'ys for Def't.

77 At a Court held on the 5th day of November, 1915.

This action having been heard and the Court being advised it is ordered that the special demurrers of the defendant Ohio River Contract Company and Fred Swisher to the petition be and are overruled to which the defendants except.

It is ordered by the Court that the defendants be and are given one week to answer.

At a Court held on the 12th day of November, 1915:

Came the defendant Ohio River Contract Co. by counsel and filed an answer herein.

Came the defendant Fred Swisher by counsel and filed an answer herein.

78 Said answer of Ohio River Contract Company, filed on the 12th day of November, 1915, is as follows:

Jefferson Circuit Court, Common Pleas Branch, Second Division.

JOHN J. HAINES, Plaintiff,
vs.
OHIO RIVER CONTRACT COMPANY and FRED SWISHER, Defendants.

Answer with Plea to the Jurisdiction by Defendant Ohio River Contract Co.

Not waiving in any manner whatever its motion to quash the return on the original and alias summons or its special demurrer to the jurisdiction of this Court, but expressly reserving, and by this plea expressly raising, its objection to the jurisdiction of this Court over the subject matter of this action and over the person of this defendant, comes the defendant, Ohio River Contract Com-
79 pany, and for answer herein says:

1.

That this defendant is a corporation organized by and existing under the laws of the State of Indiana, and of that State only, and with its residence and principal place of business in the City of Evansville, State of Indiana, and that is is a non-resident of the State of Kentucky, and is not now doing, and never has done any business in Kentucky.

Defendant states that at the time of the occurances set forth in the plaintiff's petition and at the institution of this action, and continuously since said dates, it has been engaged in the performance of a contract entered into by and between this defendant and the United States Government, as evidenced by a written instrument executed by the Hon. Wm. Lloyd Garrison, as Secretary of War for the United States of America, and now on file with that official, that the performance of the said contract calls for the erection and construction of a certain lock, dam and canal referred to in the plaintiff's petition, and which is exclusively located and situated *in* a certain tract of land on the Ohio River, lying near the City of Louisville, Kentucky and acquired by the United States of America by purchase or condemnation, by and with the consent of the legislature
80 of Kentucky, and over which territory the United States of America has exclusive jurisdiction and control, and which tract of land will hereinafter be referred to as the Government Reservation; that each and every part of the work and labor performed by this defendant pursuant to said contract, and which is the only work, or labor, or contract performed by it in or near to the Commonwealth of Kentucky, is executed and performed entirely and exclusively, save as hereinafter set forth, within and upon the aforesaid Government Reservation; that in the performance and execution of each and every portion of said contract and of the work and labor incident thereto, this defendant is without any discretion in the premises, but is rigidly bound, directed, regulated and controlled by the terms of the said contract with the United States of America,

as *interrupted* and enforced by its engineers and agents upon said Government Reservation and acting through the War Department of the United States; that the only work or labor now, or at any time, performed by this defendant outside of or beyond said Government Reservation, consists in dumping certain dirst, rocks and other debris dredged by it from within said Government Reservation upon certain land in the State of Kentucky, controlled by the Kentucky and Indiana Terminal Railway Company (hereinafter re-
81 ferred to as the K. & I.); that said dumping is, and always has been affected pursuant to written permission granted therefor by said K. & I. to the United States of America, that for said dumping privilege no consideration, of any kind or description, passes or ever has passed to or from either this defendant, or said K. & I. or the Government of the United States.

Defendant states that the accident and injury, if any there was, set out in plaintiff's petition, and each and every individual and instrumentality, either directly or indirectly connected therewith, was each of them located within and upon said Government Reservation, and not within or upon any territory controlled by the Commonwealth of Kentucky, or the Courts thereof.

Defendant states that the original summons issued upon plaintiff's petition herein, was served by the Deputy Sheriff of Jefferson County upon one C. H. Wright as the agent of this defendant, while said *su*puty Sheriff and said Wright were each of them standing within and upon said Government Reservation, and not within or upon any territory controlled by the Commonwealth of Kentucky or the Courts thereof.

82 Defendant states that the second, or alias summons, was served upon said C. H. Wright while h*as* was at his home in Louisville, Ky. and en-aged in his private affairs, and not engaged in any business or agency of any kind whatever for and on behalf of this defendant.

Wherefore, defendant states that this court is without jurisdiction over either the subject matter of this action or the person of this defendant, and prays that plaintiff's petition be dismissed for want of said jurisdiction.

II.

In no manner or degree waiving its objection to the service of the summons herein, or its plea of the jurisdiction of this court above set out, but expressly *reversing* and repeating its objection to the service of the summons herein and to the jurisdiction of this court over the subject matter and over the person of this defendant for further answer herein defendant says.

That it denies that it was engaged at all or any of the times mentioned in the plaintiff's petition, in making certain or any excavations in the banks of the Ohio River near 27th Street, or at any other place in Louisville, Kentucky; denies that it was preparing to construct a new lock at or near said place, except as hereinbefore more particularly appears.

Denies that on or prior to February 28, 1914, the plaintiff, John J. Haines, was employed by the defendant, Ohio River Contract

Company; or was on said day or any other day, ordered or directed by said company, its officers or agents superior in authority or control to the plaintiff, or whose orders or directions he was required to obey, or any other officers or agents of said company, to station himself upon a certain scow situated along side of a dredge boat, at the place named in the plaintiff's petition, or any other place, or any other scow, or to observe or look after the proper loading of the
83 rock in the said scow. Defendant denies that for the purpose of unloading said rock into said scow, the defendant company was using or employing a contrivance known as a "boom", which consisted, among other things, of a large dipper or bucket, used to contain rock, or an appliance known as a dipper stick or bucket stick, attached to the boom. The defendant states that the contrivance actually used for the purpose stated was known as a steam dredge or dipper, which consisted among other things, of a boom and a dipper stick and a dipper. Defendant admits that said appliances were moved from place to place by means of engines located on the dredge boat, and that said engine and dredge boat were owned by this defendant. Defendant admits that said engine was operated by its engineer and states that both of said engines were operated by said engineer. Defendant denies that in the prosecution of said work of removing said rock from the river bank, or depositing same in the scow by the use of said dipper or bucket, or in the prosecution of any other work, the plaintiff was always, or at all, required to be in close proximity to said bucket or dipper when the said load of rock was lifted or swung out over said scow for the purpose of being dumped therein, or for any other purpose, or at any other time; denies that plaintiff was required or directed under his employment to see that all
84 the rock contained in said dipper or bucket was removed therefrom or deposited in the scow at the proper place, or at all.

Defendant denies that it, or its agents or servants, by or through their gross or any negligence, or at all, permitted the engines, or parts thereof, located upon its dredge boat aforesaid, to become or remain in a defective or dangerous condition in the respects set out in plaintiff's petition or any other respects; denies that the throttle valve, or other parts used in connection therewith on the said engine, were worn, or old, or leaking, denies that it was difficult or impossible for the engineer in charge thereof to control the movements of the boom; denies that often times, or at all, by reason of said dangerous or defective condition of said engines, or for any other reason, said boom or appliances thereto including the dipper stick, would move or jerk or lu-ch without being caused to be moved by any act on the part of the engineer; denies that said boom or dipper stick or dipper were thereby, or at all, rendered defective or dangerous because the said appliances would often move suddenly or without being moved or controlled by the engineer in charge of said
85 engine, or for any other reason, denies that said boom or dipper stick or dipper were defective or dangerous at all: denies that the said movements of the said boom or dipper stick or dipper or bucket were thereby, or at all, rendered irregular or uncertain or dangerous.

Defendant denies that it, or its agents or servants, as aforesaid,

or at all, knew or by the exercise of ordinary care could have known of the dangerous or defective condition of the engine or appliances thereof; denies that the plaintiff did not know or could not by the exercise of ordinary care have known of said defective or dangerous condition of said engine and appliances, if such dangerous condition existed.

Defendant denies that on February 28th, 1914, or any other day while plaintiff was standing upon said scow or engaged in the work aforesaid, under his employment with the defendant company, or after a load of rock had been lifted from the river bank into said dipper, or bucket by means of the said boom, or any other means, or swung out over said scow, or while said bucket or dipper was in close proximity to where the plaintiff was standing, or at any other time or place or in any other manner, the said dipper or bucket was, because or by reason of the joint or concurring
86 gross, or any negligence of the defendant, or its agents or servants, as aforesaid, in maintaining a defective or dangerous engine or appliance to said engine which controlled the movements of the said boom or dipper stick or bucket, or because, or by reason of the gross, or any negligence of the defendant, Fred Swisher, in managing or controlling the action or movements of said dipper or dipper stick, or for any other reason, or at all, caused to collide with or to *strick* with great, or any force or violence, the head or face of the plaintiff, or to break his jaw bone, or to knock out certain teeth, or to injure the structure of many, or any others, or to inflict cuts, wounds or bruises upon his face or head, or to produce shock or injury to his nerves or nervous system; denies that plaintiff was thereby caused to suffer, or did suffer, or has continuously or at all suffered, or will always or ever suffer great, or any, pain of body or mind; denies that all, or any, of said injuries are permanent, or will permanently, or at all, deprive plaintiff of his power or capacity to labor or earn money, to his damage in the sum of $30,000, or any other sum.

III.

In no manner or degree waiving its objection to the service of the summons herein, or its plea to the jurisdiction of this Court above set out, but expressly reserving and repeating its
87 objection to the service of the summons herein and to the jurisdiction of this Court over the subject matter and over the person of this defendant, for further answer herein defendant says:

That the plaintiff himself was at the time of the occurrences set forth in his petition, guilty of negligence which helped to cause and bring about the injuries complained of in his petition, and that but for such contributory negligence on the part of the plaintiff said injuries could not and would not have been received.

Wherefore, defendant pleads the contributory negligence of the plaintiff as a defense to this action.

IV.

In no manner or degree waiving its objection to the service of the summons herein, or its plea to the jurisdiction of this Court above set out, but expressly reserving and repeating its objection to the service of the summons herein and to the jurisdiction of this Court over the subject matter and over the person of this defendant, for further answer herein defendant says:

88 That at the time and on the occasion referred to in the petition, the plaintiff, John J. Haines, was an employe of this defendant and was engaged and acting at said time as assistant superintendent and in immediate control and command of the operations and work described in the petition, and that in entering and remaining in the service of this defendant, he assumed certain risks and dangers incident to the service and by his contract of service with this defendant he assumed all the ordinary risks and dangers incident to his employment, among which was the risks of injury set up in the petition and the risk and danger incident to use of tools and appliances required by defendant in carrying on the work for which he was engaged and with which he was connected as assistant superintendent and the apparatus and tools, and uses and use of same and conditions of same were such as he was entirely familiar with; defendant avers that the injuries alleged in the petition to have been received by plaintiff among the risks assumed by plaintiff in entering the employment — defendant, as incident to his service and to the operation of the machinery and to the use of tools and the business engaged in by plaintiff; that said alleged injuries could not have been avoided by the exercise of ordinary care or skill on the part of defendant,

89 its agents or servants or any of them but that said injuries if same were received, were risks assumed by plaintiff as part of the terms of his employment and defendant pleads and relies upon the facts herein set up as a bar to plaintiff's right ro recover herein.

Wherefore, having answered fully defendant prays that plaintiff's petition be dismissed and that this defendant be dismissed with its costs, and for all proper relief.

RICHARDS & HARRIS,
Attorneys for Ohio River Contract Co.

W. O. Harris, Jr. states that he is one of the attorneys for the defendant, Ohio River Contract Company, and that all of officer of said Company are absent from the State, and that all of the statements contained in the foregoing answer are true to the best of his knowledge and belief.

W. O. HARRIS, JR.

Subscribed and sworn to before me by W. O. Harris, Jr. this 21st day of October, 1915. My Commission expires January 23rd, 1918.

S. G. CONNAUGHTON,
Notary Public, Jefferson County, Kentucky.

90 At a Court held on the 4th day of December, 1915:

This action was set at rules by plaintiff on November 29th, 1915.

Came the plaintiff by counsel and filed a reply to the answer of the defendant Ohio River Contract Co.

Came the plaintiff, by counsel and filed a reply to the third paragraph of the answer of the defendant Fred Swisher herein.

Came the plaintiff, by counsel and filed a demurrer to the first paragraph of the answer of the defendant Fred Swisher herein.

It is ordered that said demurrer be assigned to December 10th, 1915 at 9 A. M.

91 Said reply filed on the 4th day of December, 1915 is as follows:

Jefferson Circuit Court, Common Pleas Branch, Second Division.

JOHN J. HAINES, Plaintiff,

vs.

OHIO RIVER CONTRACT COMPANY and FRED SWISHER, Defendant-.

Reply to Answer of Defendant Ohio River Contract Company.

The plaintiff, John J. Haines, for reply to the First Paragraph of the answer of the defendant, the Ohio River Contract Company, herein, denies that the said defendant is not now doing or has never done business in Kentucky. Plaintiff has no knowledge or information sufficient to form a belief, and therefore denies that the dam or canal, referred to in the petition, is situated on a tract of land on the Ohio River, lying near the City of Louisville, acquired by the United States of America, by purchase or condemnation, with the consent of the Legislature of Kentucky, or that the

92 United States of America has exclusive jurisdiction or control over said territory or tract of land. Plaintiff denies that every part of the work or labor performed by the defendant, pursuant to the contract in the answer referred to, is executed and performed entirely or exclusively within the alleged government reservation in the answer spoken of, or that said alleged work is the only work or labor performed by the defendant, or that in the execution of the said contract or the work or labor incident thereto, the defendant is without any discretion. Plaintiff denies that the only work or labor, now or at any time performed by the defendant outside of or beyond said alleged government reservation consists in dumping certain dirt, rocks and other debris, dredged by it within said alleged government reservation upon certain land in the State of Kentucky, controlled by the Kentucky and Indiana Terminal Railway Company, or said dumping is or always has been effected pursuant to written permission granted therefor by the said Kentucky and Indiana Terminal Railway Company to the United States of America, or that for said dumping privilege no consideration of any kind or description ever passed to or from

the defendant, or said Terminal Railway Company, or the
93 Government of the United States. Plaintiff has no knowledge or information sufficient to form a belief, and, therefore denies that the accident and injury set out in the plaintiff's petition, or each and every individual or instrumentality directly or indirectly connected therewith, was located within and upon said government reservation, or not within or upon any territory controlled by the Commonwealth of Kentucky of the Courts thereof. Plaintiff denies that the alias summons issued in the case was served upon C. H. Wright, while he was at his home in Louisville, Kentucky, engaged in his private affairs, and not engaged in any business or agency of any kind whatever on behalf of the defendant.

Paragraph 2.

For further reply to the said first paragraph of the answer of the defendant, the Ohio River Contract Company the plaintiff says that the defendant, Ohio River Contract Company, on the — day of —— 19— filed in the office of the Secretary of State, of the State of Kentucky, a statement, duly executed by its President and Secretary, wherein and whereby it named the said C. H. Wright as the agent of the said defendant in the City of
94 Louisville, Kentucky, upon whom process might be served in action brought against it in the State of Kentucky, pursuant to the provisions of Section 511 of the Kentucky Statutes, and that the said C. H. Wright was, at the time the said original summons and the alias summons was served upon him, the agent of the defendant, the Ohio River Contract Company, selected and named by it as its agent in the State of Kentucky, and City of Louisville, for the service of process upon it. Plaintiff further states that the defendant was, at the time the said summons was served upon it and at the time of the institution of this action, engaged in carrying on and prosecuting business in the State of Kentucky.

Paragraph 3.

For reply to the third paragraph of the answer of the defendant, Ohio River Contract Company, the plaintiff denies that, at the time of the occurrences set forth in his petition he was guilty of negligence, which helped to cause or bring about the injuries complained of in his petition, or that but for such contributory negligence on his part, said injuries could not and would not have been received.

95 Paragraph 4.

For reply to the Fourth Paragraph of the answer of the said defendant, the plaintiff denies that at the time or on the occasion in the petition referred to, he was acting or engaged as assistant superintendent, or in control or command of the operations or

work described in the petition. He denies that in entering or remaining in the service of the defendant, he assumed the risks of injury set up in the petition or the risks incident to use of tools or appliances required by defendant in carrying on the work for which he was engaged, or that he was engaged or connected with said work as assistant superintendent, or apparatus or tools or that the uses of the same or condition thereof were such as he was entirely familiar with, Plaintiff denies that the injuries alleged in the petition to have been received by the plaintiff, were among the risks assumed by the plaintiff in entering the employment of the defendant as incident to his service, or at all, or to the operation of the machinery or to the use of tools, or to the business engaged in by plaintiff. He denies that his said injuries could not have been avoided by the exercise of ordinary care or skill, on the part of the defendant, its agents or servants, or any of them, or that
96 the said risks or injuries were assumed by the plaintiff as part of the terms of his employment.

Wherefore, having fully replied, plaintiff prays as in his petition.

O'DOHERTY & YONTS,
Counsel for Plaintiff.

97 At a Court held on the 18th day of February, 1916:

Came the plaintiff, by counsel and by leave of Court withdraws the first paragraph of his reply herein.

Came the plaintiff, by counsel and filed a demurrer to the first paragraph of the answer of the defendant Ohio River Contract Co.

The Court being advised it is ordered that said demurrer be sustained to which the said defendant excepts.

The defendant, Ohio River Contract Co. declining to amend its answer and the Court being advised it is adjudged by
98 the Court that this Court has Jurisdiction to hear the question of negligence and injury complained of herein.

It is ordered by the Court that this action be assigned to March 27th, 1916 for trial.

It is ordered by the Court that the Clerk of the United States Circuit Court for the Western District of Kentucky be and he is hereby requested to turn over to the Clerk of this Court all the depositions filed in said Court in this case.

Said demurrer filed on the 18th day of February, 1916 is as follows:

Jeffetson Circuit Court, Common Pleas Branch, 2nd Division.

JOHN J. HAINES,
vs.
OHIO RIVER CONTRACT CO.

Demurrer.

The plaintiff says that the first paragraph of the answer of the defendant the Ohio River Contract Co. does not state facst sufficient

to constitute or support a defense to the cause of action in the petition stated.

99 Wherefore plaintiff demurs thereto.

O'DOHERTY & YONTS.

STATE OF KENTUCKY,
County of Jefferson:

I, Frank Dugan, Clerk of the Jefferson Circuit Court, do hereby certify that the foregoing 25 pages contain a full, true and complete transcript of the record and proceedings from and including the order entered on the 24th day of September 1915, in the action wherein John J. Haines, is plaintiff and Ohio River Contract Co., is defendant #86285, an action lately pending in the Jefferson Circuit Court. Common Pleas Branch, Second Division, as the same appears of record and now on file in my said office.

Witness, Frank Dugan, Clerk of said Court this 23rd day of February, 1916.

FRANK DUGAN,
Clerk, Jefferson Circuit Court.

100 Be it remembered that on the 29th day of February, 1916, the following order was entered in the Court of Appeals of Kentucky.

OHIO RIVER CONTRACT COMPANY, Petitioner,
vs.
THOMAS R. GORDON, Judge, Respondent.

Order.

The Court being advised the motion for a temporary restraining order herein is sustained, and it is ordered by the Court that the respondent Judge Gordon, as Judge of the Jefferson Circuit Court, Common Pleas Branch, 2nd Division, is hereby temporaily restrained and prohibited from proceeding further with an action at law now pending before him as Judge of said Court, wherein John Haines, is Plaintiff and the Ohio River Contract Company, and Fred Swiser are Defendants until the further orders of this Court.

And then again on the 25th day of April, 1916, the following order was entered herein, to-wit:

OHIO RIVER CONTRACT COMPANY, Petitioner,
vs.
THOMAS R. GORDON, Judge, Respondent.

Order.

Came the petitioner by Counsel and offered for filing an amended petition, to which the Defendant objects, and motion submitted.

And then again on the 26th day of April, 1916, the following order was entered in the Court of Appeals of Kentucky.

101

OHIO RIVER CONTRACT COMPANY, Petitioner,
vs.
THOMAS R. GORDON, Judge, Respondent.

Order.

The Court being advised the motion of the petitioner to be permitted to file an amended petition is sustained and the amended petition ordered filed.

The amended petition referred to in the foregoing order is in words and figures as follows,

102

Court of Appeals of Kentucky.

THE OHIO RIVER CONTRACT COMPANY, Petitioner,
vs.
GORDON, Judge, Respondent.

Amended Petition.

Amendment to Petition for Writ of Prohibition.

Comes the Petitioner, The Ohio River Contract Company, by counsel, and with leave of Court, hereby amends its Petition for Writ of Prohibition heretofore filed, and for amendment adds to said petition the following allegations, to-wit;

That the tract of land upon which the petitioner was erecting and constructing the lock, dam and canal on behalf of the United States of America as referred to in its said petition, and which this petitioner there alleged was acquired by the United States of America by purchase or condemnation by and with the consent of the Legislature of Kentucky, was so acquired according to the terms of the Constitution of the United States of America and Art. 1, Sec. 8, Clause 17 thereof.

This petitoner alleges that by virtue of said provision of
103 the Constitution of the U. S. of America, the exclusive jurisdiction over said tract of land is vested in the congress of the United States and all jurisdiction thereover by the Commonwealth of Kentucky or the congress thereof, is by virtue of said provision of the Constitution of the United States absolutely divested and destroyed.

Wherefore, this Petitioner pleads and relies on said clause and provision of the Constitution of the United States of America in support of this, its petition for Writ of Prohibition, and alleges that if said petition be overruled and this Court refuses to issue said writ, such refusal and the order entered pursuant thereto will be in contravention and derogation of the Constitution of the United States of America.

This petitioner further alleges that at the time of the institution of this action at law by John J. Haines against this petitioner and another, in the Jefferson Circuit Court, as alleged in its said petition this petitioner was neither then, nor at any of the times mentioned in the petition filed by the said Haines, doing any business in the Commonwealth of Kentucky, nor has it ever done any business in this state.

Wherefore this petitioner alleges that the authority of the Jefferson Circuit Court over it and over said action at law is without due process of law, as provided for in the 14th Amendment to the Constitution of the United States of America, and that if this Court refuses to issue its Writ of Prohibition as prayed in this petition, such refusal and the order entered pursuant thereto will be in contravention and derogation of the amendment to the Constitution

104 of the United States of America; and Petitioner hereby pleads and relies upon said amendment to the Constitution of the United States of America in support of this, its Petition for Writ of Prohibition.

J. P. HOBSON & SON,
RICHARDS & HARRIS,
Counsel for Petitioner.

Endorsed: 1916, April 25th. R. W. Keenon, C. C. A.

The notice referred to is as follows:

Kentucky Court of Appeals.

THE OHIO RIVER CONTRACT COMPANY, Petitioner,
vs.
GORDAN, Judge, Respondent.

Notice.

The respondent is notified that on Tuesday, April 25th., the petitioner will tender and offer to file herein the amended petition, a copy of which is attached to this notice.

This April 22, 1916.

RICHARDS & HARRIS,
J. P. HOBSON & SON,
For Petitioner.

105 Service of the above notice with copy attached accepted this 24th day of April 1916, and motion objected to.

O'DOHERTY & YONTS,
Att'y for Defendant.

Endorsed: 1916, April 25, filed. R. W. Keenon, C. C. A.

106 And then again on the 28th day of April, 1916, the following order was entered in the Court of Appeals of Kentucky.

OHIO RIVER CONTRACT COMPANY, Petitioner,
vs.
THOMAS R. GORDON, Judge, Respondent.

Order.

Came defendant and respondent by Counsel and filed Demurrer to the petition of the Petitioner and moved the Court to dissolve the temporary restraining order granted herein, and without waiving demurrer, tendered answer, to the filing of which the petitioner objects, and the case coming on to be heard was argued by Judge Matt O'Dougherty for the Respondent and W. O. Harris, Jr., for the Petitioner and submitted on demurrer objections and generally.

The Demurrer referred to in the foregoing order is in words and figures as follows, to-wit:

Court of Appeals.

OHIO RIVER CONTRACT COMPANY, Petitioner,
vs.
Honorable THOMAS T. GORDON, Judge, Respondent.

Demurrer.

The respondent, Thomas R. Gordon, says that *that* the petition herein does not state facts sufficient to constitute or support a cause of action against him. Wherefore, he demurs thereto.

107 O'DOHERTY & YONTS,
Counsel for Respondent.

Motion.

Respondent also moves to discharge the temporary restraining — granted herein.

O'DOHERTY & YONTS, *Att'ys.*

Endorsed: 1916, April 28, filed. R. W. Keenon, C. C. A.

The answer filed by Respondent on April 28th, 1916, is in words and figures as follows:

Court of Appeals of Kentucky.

OHIO RIVER CONTRACT COMPANY, Petitioner,
vs.
Hon. THOMAS R. GORDAN, Judge of the Jefferson Circuit Court, Common Pleas Branch, Second Division, Respondent.

Answer.

108 The Respondent, Thomas R. Gordan, without waiving his demurrer to the Petition herein, for answer to so much thereof as he deems it proper to answer, says that the affidavits, in

the petition herein referred to, will best show what they contain and what they tend to prove.

He further states that the various affidavits copied in the transcript in this case, and which were filed by the parties plaintiff and defendant, on the hearing of the motion to quash the return upon the summons, were read upon the said hearing, as was also the exhibits filed with said affidavits, including a certified copy of the statement of the corporation, the Ohio River Contract Company, filed in the office of the Secretary of State, which appears on pages 17 and 18 of the Transcript.

He makes said transcript a part of his answer herein, and, relying thereon, asks that the petition herein be dismissed.

Respondent further states that a copy of the restraining order, granted by this Honorable Court, when petitioner filed its first petition for Writ of Prohibition against him therein, was duly served upon him, and that pursuant thereto, proceedings in the action of Haines v. Ohio River Contract Company were suspended until the petitioner voluntarily dismissed its petition for Writ of Prohibition in this Court, and resumed the defense of the case before him.

O'DOHERTY & YONTS,
Counsel for Respondent.

109 The respondent, Thomas R. Gordan, says that the statements of the foregoing answer are true.

THOS. R. GORDAN.

Subscribed and sworn to before me by Thomas R. Gordan this 27 day of April, 1916.

My Commission expires March 8, 1920.

J. W. FOWLER, Jr.,
N. P., Jeff. Co., Ky.

Endorsed: 1916, April 28, filed. R. W. Keenon, C. C. A.

110 And then on the 26th day of May, 1916, the following judgment and order was entered in the Court of Appeals of Kentucky, to-wit:

In Court of Appeals

The Ohio River Contract Company, Petitioner,
vs.
Honorable Thomas R. Gordon, Judge, Respondent.

Petition for Writ of Prohibition.

The Court being sufficiently advised the petition for a writ of prohibition is overruled and the writ denied.

It is therefore considered that the respondent recover of the petitioner his costs herein expended.

On the foregoing judgment the following opinion was rendered by the Court:

111 Court of Appeals of Kentucky, May 26, 1916.

THE OHIO RIVER CONTRACT COMPANY, Petitioner,
v.
THOMAS R. GORDON, Judge, Respondent.

Opinion of the Court, by Judge Hurt, Dismissing Petition for Writ of Prohibition.

The Ohio River Contract Company, whom we will call the petitioner, is a corporation which was organized by and exists under the laws of the state of Indiana, and as such is qualified to *be* and be sued in its corporate name. It maintained its principal
112 place of business and all of its officers reside in the state of Indiana. Under a contract with the United States Government, it was engaged in the work incident to the construction of a canal and a lock and dam upon a certain piece of land, which had been acquired by the Federal Government by purchase or by condemnation, and with the consent of the legislative branch of the government of the state of Kentucky. The land is situated upon or near the south bank of the Ohio river, in Jefferson County, and it is to be inferred from the record that it was acquired by the Federal Government for the purpose of widening the canal at that point, and the erection of a lock and dam. The record does not disclose the extent of the lands thus acquired. The machinery used and all the operations of the petitioner were conducted upon this piece of land, except that it constructed and maintained a tram way, which extended over the boundaries of the piece of land and onto lands which are the property of Kentucky and Indiana Terminal Railway Company, and which are situated in Jefferson County and the tram way was used in removing, by means of it, the cars, which were loaded with dirt and stones obtained by the digging of the canal, from the lands of the Federal
113 Government to the lands of the Kentucky and Indiana Terminal Railway Company's lands, where the debris was dumped. When the petitioner began operations under the contract for the work mentioned, it made out and filed in the office of the Secretary of State of Kentucky, a statement in which it designated C. H. Wright as its agent, upon whom process could be served in the event of any one instituting litigation against it in the state of Kentucky, as is required by section 571, of the Ky. Statutes, of all corporations which engage in business in this state. The statement was to the effect, that the place of business of the Ohio River Contract Company (a corporation of the state of Indiana) in Kentucky was at Lock No. 41, 31st. and the river, Government Reservation, Louisville, Ky., and that Clarence H. Wright, of Louisville, Ky., was its agent thereat upon whom process might be served in any suit which might be brought against it within the State of Kentucky. One Haines, an employee of the petitioner, instituted an action in the Jefferson circuit court against the petitioner and one

Fred Swisher, an employee of the petitioner, in which he allaged, that he had received a personal injury, which was caused by
114 the negligence of petitioner and Swisher, and sought a recovery in damages against them. A summons was issued against plaintiff and Swisher, directed to the sheriff of Jefferson County. It was served upon Wright, as the agent of petitioner, and upon Swisher, but the service upon each of them was made upon the piece of land which had been acquired by the Federal Government.

The petitioner filed its petition, alleging that it was an inhabitant of the State of Indiana and that Haines and Swisher were citizens of the state of Kentucky, and that Swisher was fraudulently joined with it as a defendant in order to give the state courts jurisdiction of the cause of action, and prayed a removal of the cause into the Federal Court for the Western District of Kentucky. The motion to remove the action into the Federal Court was overruled. The petitioner then caused a transcript of the record to be filed in the Federal Court, when, upon motion of Haines, that court remanded the case to the Jefferson circuit court. The peti-
115 tioner then entered a motion in the latter court to quash the return upon the summons which had been served upon Wright as its agent, and Swisher entered a like motion to quash the return as to him. While these motions were pending, an alias summons was issued and served upon Wright, as petitioner's agent, at his home in Louisville, and not upon the land which had been acquired by the Federal Government. Many affidavits were filed as evidence upon the motions to quash the return upon the summons, and the motions were overruled. Then the petitioner and Swisher, without waiving their objections to the service of the summons upon them, filed special demurrers to the jurisdiction of the court of their persons, and, also, of the subject matter of the action.

These demurrers were overruled. They then filed answers, in which, by the first paragraphs, they plead facts which, as they contend show that the courts of Jefferson County had neither jurisdiction of their persons nor of the cause of action, and then without waiving their pleas to the jurisdiction, plead to the merits of the action.

116 Haines then demurred to the paragraph of the answers which plead the want of jurisdiction of the court. Before these demurrers had been disposed of the petitioner filed a petition in this court, by which it sought a writ of prohibition against the respondent, restraining him as a judge of the Jefferson circuit court, to whose division the action had been assigned, from proceeding, any further in the disposition of the case. Thereafter the petitioner dismissed its petition for a writ of prohibition, in this court, and returning to the Jefferson circuit court, moved the court to first hear and decide the issue raised by it relating to the jurisdiction of that court. This motion was sustained and the issue tried and decided adversely to petitioner and Swisher.

It should be stated that when the motions to quash the return upon the summons, as well as when the special demurrers were filed, the

petitioner entered its appearance specially for those purposes and no others, and caused the record to so state.

117 After the circuit court decided that it had jurisdiction of both the persons of the petitioner and Swisher and the cause of action, which Haines was maintaining against them, the petitioner then instituted the present action in this court. It seeks a writ of prohibition against the respondent, as the judge of the Jefferson Circuit Court, Common Pleas Branch, Second Division, to restrain him from proceeding any further with or making any further order in the case of Haines against petitioner, in the Jefferson circuit court, upon the alleged ground that such court has not jurisdiction of the person of petitioner nor the cause of action attempted to be stated against it.

Its contention is that it is a non-resident corporation and has no agent nor place of business in the state of Kentucky, and is not nor ever has engaged in doing business in the state of Kentucky, and therefore the courts of Kentucky have not and can not acquire jurisdiction of it, so as to authorize a personal judgment against it; that the court over which respondent presides could only acquire jurisdiction of its person by a valid service of summons upon it or by a waiver of its right to object, and that a valid service of

118 summons can not be had upon it, unless it was engaged in doing business in the state; that the service of the summons upon Wright was void, because it was done upon the lands of the Federal Government, where the processes of the state courts can not run, and that the service of the alias summons was void, because it was not doing business in the state of Kentucky, and that Wright was not its agent for any purpose in Kentucky, and was without the jurisdiction where he was agent, except upon his own business, and hence it had never been served with a summons, nor had it done any act which amounts to a waiver of its right to object to the alleged jurisdiction of the Jefferson circuit court.

Its further contention is that it is not a citizen of Kentucky; that the place at which it was engaged in business and where Haines received his injury is not in the state of Kentucky; that it is a place which had been acquired by the Federal Government by purchase or condemnation, with the consent of the Legislature of Kentucky, in accordance with Article 1, Sec. 8, subsection 17, of the Federal Constitution, and that the jurisdiction of the Federal Govern-

119 ment is exclusive thereon, and the jurisdiction of the courts of Kentucky has been removed and destroyed upon such territory, and hence the court of respondent has no jurisdiction of the subject matter of the action. This court, by the petition for the writ of prohibition, is called upon to interfere and prohibit the Jefferson circuit court from trying the action and from making any order or rendering any judgment in it. The petitioner claims that to permit the respondent to proceed any further with the hearing of or determination of the cause would be to deny it the due process of law, which is guaranteed to it by the Fourteenth Amendment to the Federal constitution.

To determine whether the prayer of the petition should be con-

sidered, it is necessary to take into consideration the jurisdiction of this court, and its power and authority to interfere with the subordinate courts in the exercise of their jurisdiction and the course of the administration of justice in them. The jurisdiction of this court is fixed by the provisions of Section 110, of the Constitution of the state, wherein the constitution makers significantly said:

120 "The court of Appeals shall have appellant jurisdiction only, * * * under such restrictions and regulations not repugnant to this constitution, as may from time to time be prescribed by law."

The legislative department of the government of the state has, by statutes, prescribed the mode, manner and time for this court to exercise its appellante jurisdiction. A petition for a writ of prohibition presented in this court is not one of the methods or means provided by or through which a decision of a subordinate court can be brought up for a review by this court. The law makers have very wisely seen fit to repose the jurisdiction to originally hear and determine all controversies between citizens in the circuit courts and in the courts inferior to the circuit courts. These courts have their sittings in the communities where the causes of controversy must generally arise and are easily accessible to all the citizens of every station in life, and where the litigants, witnesses and those of the citizens who are called upon to assist in the administration of justice, have the advantage of acquaintanceship with each other, and

121 with all those who may participate in the trials, the constitutional provision, supra, also, creates, whatever of original jurisdiction this court has and contains the warrant for the granting of a writ of prohibition by this court, in the following language:

"Said court shall have power to issue such writs as may be necessary to give it a general control of inferior jurisdiction."

The same authority is bestowed upon it by section 949, of Kentucky Statutes. While the purpose was to primarily make this court one of appellate jurisdiction only, it must have occurred to the constitution makers, that occasions might arise, when it would be necessary to the full administration of justice, that this court should have some degree of original purisdiction. Reading these provisions in the light of their express language which makes this court primarily one of appellant jurisdiction, with its original jurisdiction limited to the purposes expressed, and in the light of the various statutes prescribing the mode, manner and time of the exercise of its appellate jurisdiction, it is manifest that it was not intended by the law makers as a general principle, that this court, by

122 the use of any extraordinary writs or processes, should interfere with the jurisdiction of the inferior courts, or with their discretion in the hearing or decision of questions of either law or fact, of which they have original jurisdiction, or with the course of justice in the inferior courts when it is proceeding in the ordinary and usual way. Only in exceptional cases or where an unusual state of facts is presented, which makes it apparent that injurious consequences will result, against which there is no other adequate remedy, will the writ of prohibition be used, and then for the purpose most

often of restoring the administration of justice to its accustomed channel, that its ordinary course may be insured. The writ of prohibition is not a writ which can be demanded as a matter which lies within the discretion of this court. For the reasons above stated, it has exercised its discretion to grant such a writ very sparingly, and then only as a matter of necessity to shield from injustice, against which there was no other adequate remedy and to preserve the orderly administration of the laws. It has been held, that under the provisions of Section 110, of the Constitution, supra, and
123 Section 949, of Ky. Statutes, supra, this court has authority to issue a writ of prohibition to restrain an inferior court when it is acting without its jurisdiction, or when it is proceeding erroneously within its jurisdiction, and the party has no adequate remedy for the wrong he will suffer by reason of the erroneous proceeding, through appeal. Weaver v. Toney, 107 Ky. 419; Equitable Life Assurance Society v. Hardin, 166 Ky. 51. It has not however, at any time been held that the writ of prohibition will issue in every instance and on every occasion, merely, because the court is proceeding out of its jurisdiction. Ordinarily when a court is proceeding out of its jurisdiction, there exists an ample and edequate remedy by appeal. In such cases the writ has been denied. White v. Kirby, 147 Ky. 496; Fish v. Benton, Judge, 138 Ky. 644. It has denied writs of prohibition to control the discretion of inferior tribunals in the matter of imposing fines, when the court was proceeding within its jurisdiction, although there was no right of ap-
124 peal from the judgment and the court may have erred in its judgment. Carey v. Sampson, 150 Ky. 460; Com., etc. v. Weissenger, 143 Ky. 369; Standard Oil Co. v. Linn, 17 R. 832. It has denied writs against commissioners of courts and judges of courts inferior to the circuit courts, because the parties had ample remedies in the circuit courts. In no instance has a writ of prohibition been allowed against a court proceeding out of its jurisdiction or erroneously within its jurisdiction when any other adequate remedy for the threatened wrong existed, which was adequate. If the right of appeal exists and it is an adequate remedy, the complaining party must be relegated to his remedy through appeal. A review of all the cases decided by this court upon application for writs of prohibition under Section 110, supra, sustains the view, that the writ is granted as a matter of sound discretion, determined, upon the facts of the particular case, which must present an exceptional or unusual state of facts, which make it apparent that an injury or violation of one's rights is threatened, and against the results of which he has no adequate remedy, other than the writ of prohibition. Weaver
125 v. Toney, Judge, 107 Ky. 419; L. & N. R. R. Co. v. Miller, 112 Ky. 464; Campbellsville Telephone Co. v. Patterson, 114 Ky. 52; Jenkins v. Berry, 119 Ky. 350; Dupoyster v. Clarke, 121 Ky. 694; Renshaw v. Cook, 129 Ky. 347; Rush v. Denhardt, 138 Ky. 238; I. C. R. R. Co. v. Rice, 154 Ky. 198; Equitable Life Assurance Society v. Hardin, 166 Ky. 51; Louisville Public Warehouse Co. v. Miller, etc. 26 R. 351; Fish v. Benton, 138 Ky. 644; White v. Kirby, 147 Ky. 496; Montgomery v. Viers, 130 Ky. 694; Com. v. Bdter,

136 Ky. 689; McGee's Extr. v. Weissenger, 147 Ky. 321; Morgan v. Clements, 153 Ky. 33. The case of Smith v. Davis, 170 Ky., is not inconsistent with the view, herein expressed, since the writ was asked, to restrain the circuit court in an action for divorce, wherein no appeal would lie.

In the case at bar, it appears that the respondent has already heard and decided, in the court over which he presides, the issues made as to the jurisdiction of the person and subject matter of the action in due course of judicial procedure, and before the petition herein was filed. These were mixed questions of law and fact. The judge of the Jefferson circuit court must necessarily exercise his judicial discretion and hear and decide the issues. He had
126 original jurisdiction to do so. The effect of a writ of prohibition is to apply to this court to review the decisions of the respondent, as though upon appeal, and if the judgment of this court was not in conformity to his decision, to, in effect, require him to reverse his judgment and to dismiss the proceedings. These matters are such that the petitioner has an undoubted right to have them reviewed by this court upon appeal, if he has occasion to desire the same to be done. He has an adequate remedy and no exceptional or unusual facts are presented, which show that if the respondent is in error, that petitioner will suffer any injurious results, against which he has no remedy, which will justify this court in interfering with the usual course of proceedings in the court below, by a writ of prohibition. Of course, we make no intimation as to whether the decisions complained of are sound or unsound.

It is insisted, however, for petitioner, that in the event a trial should be had in the court over which respondent presides, of the action of Haines against it, and it should result adversely to petitioner, and he should upon appeal secure a reversal of the judgment because of want of jurisdiction of the court, then when it was remanded that it would be held, that by its act of appeal-
127 ing from the judgment to this court, it had entered its appearance to the action and waived its objection to the jurisdiction of the court over its person and that it would be before the court for all further process of the case, in accordance with the rule in Grace v. Taylor, 1 Bibb, 430; Pendleton v. Pendleton, 112 S. W. 674; Asher v. Cornett, 113, S. W. 131; Foster-Milburn Co. v. Chinn, 137 Ky. 834; Job's Iron & Steel Co. v. Clarke, 150 Ky. 246; Southern C. & C. Co. v. Bowling Green Coal Co., 161 Ky. 477, and Western Indemnity Co. v. Rupp, 235 U. S. 261. Doubtless, such a result would have the effect indicated, so far as the court below would thereby acquire jurisdiction of the person of petitioner yet has not already such jurisdiction, which question we do not decide, but it would not have the effect to create jurisdiction of the subject matter of the action in the court of respondent. Such jurisdiction is created by the laws and not by any act of the party. To give such a contention weight, however, it would have to be assumed, that the decision of the suit upon its merits

would be adverse to the petitioner, and that the decision
128 of this court would be favorable to it. Besides, if such a result should come to petitioner, it would only be in the same situation in which the law places every litigant laboring under similar conditions. It will be observed from the authorities above cited, that it has for over a century been the established law in this state, that although a litigant has not been brought properly before a trial court, so as to give that court jurisdiction of his person, and judgment goes against him and he appeals to this court; if the judgment is reversed and the cause remanded, he is considered to have waived the question of jurisdiction of his person by the trial court and such court then has jurisdiction of his person for all the purposes of the action. The same rule prevails in substantially all of our sister jurisdictions. The effect of it has never been considered or held as a prejudice to a litigant's substantial rights. So long as such principle is held to be sound law and applicable to every litigant, the fear of the result of it could not be reasonably held to be a threatened danger, against the injurious results of which there was no adequate remedy, such as to
129 justify this court, upon a speculation, that it would result injuriously to petitioner, to interfere in his behalf by a writ of prohibition, when we apply the doctrine to -very other litigant. The petition is therefore dismissed, and the motion for a writ of prohibition denied.

J. P. Hobson & Son, Frankfort, Ky.; Richards & Harris, Louisville, Ky., for petitioner.
O'Doherty & Younts, Louisville, Ky., For Respondent.
"C."

130 Be it remembered that on the 27th day of June, 1916, the following Petition for Writ of Error from Supreme Court of the United States to the Court of Appeals of Kentucky was filed, towit:

Court of Appeals of Kentucky.

THE OHIO RIVER CONTRACT COMPANY, Plaintiff in Error,
vs.
Honorable THOMAS R. GORDON, Judge of the Jefferson Circuit Court, Defendant in Error.

Petition for Writ of Error from Supreme Court of the United States to the Court of Appeals of Kentucky.

To the Honorable W. E. Settle, acting Chief Justice of the Court of Appeals of Kentucky:

Now comes the Ohio River Contract Company, plaintiff in error and petitioner herein, and for its Petition for a Writ of Error from the Supreme Court of the United States to the Court of Appeals of Kentucky states:

131 That it is, and at all of the times hereinafter mentioned was, a corporation duly organized under the laws of the State of Indiana and a citizen of the United States of America, having its home office in the city of Evansville, Indiana, which is and was the only office it maintained.

That it is now and at all of the times hereinafter mentioned was engaged in the business of executing and performing various contracts entered into by and between it and the United States of America for the construction and erection of various locks, dams and canals designed by the United States of America.

That on July 30, 1914, there was filed in the Jefferson Circuit Court by one John J. Haines, a citizen of Kentucky, an action at law wherein this petitioner and plaintiff in error, The Ohio River Contract Company, and one Fred Swisher, a citizen of Kentucky, were named as defendants, wherein a cause of action was alleged for damages for certain personal injuries sustained while Haines was employed by this petitioner, The Ohio River Contract Company, while it was constructing a certain lock and canal for the United States of America. Summons issued thereon and on August 4, 1914, was served upon an agent of this petitioner while said agent was within the tract of land owned by the United
132 States of America and upon which this petitioner was erecting and constructing said canal.

That this petitioner filed its motion to quash the return upon the summons and in support thereof filed various affidavits setting forth, among other things, that the tract of land wherein said cause of action, if any, arose, and wherein said summons was served, was acquired by the United States of America by purchase of condemnation by and with the consent of the Legislature of Kentucky, and that this petitioner was a foreign corporation doing no business in the State of Kentucky.

That the Jefferson Circuit Court, acting through the Honorable Thomas R. Gordon as Judge of the Common Pleas Branch, Second Division thereof, overruled said motion to quash; whereupon this petitioner filed in said Court its special demurrers to the jurisdiction thereof over the person of this Petitioner and over the subject matter of the atcion, which said demurrers were overruled. Whereupon this Petition- filed in this Court its petition for a Writ of Prohibition forbidding said Jefferson Circuit Court to proceed further with said cause, but upon this petitioner's own motion said Petition for Writ of Prohibition was dismissed without prejudice. That in the meantime an alias summons was issued upon the petition of the said plaintiff, Haines, and was served upon the agent of this
133 petitioner while said agent was at his home and engaged in his private affairs and was not representing this petitioner in any manner.

That thereupon this petitioner filed in said Jefferson Circuit Court its answer, in the first paragraph of which it plead that said Jefferson Circuit Court had no jurisdiction over the person of this petitioner or over the subject matter of said action, and in support of said plea it alleged, among other things, that this petitioner was a

foreign corporation and non-resident of the State of Kentucky, and then neither doing any business in the State of Kentucky nor ever having done any business therein; that at the time of the occurrences set forth in the petition of the said plaintiff, Haines, and at the institution of his action and continuously since said date, this petitioner was engaged in the performance of a certain contract entered into by it with the United States of America, as evidenced by a written instrument executed by its Secretary of War and which contract provided for the construction of a certain lock and canal re-
134 ferred to in the petition of the said plaintiff, Haines, and which was exclusively located in a certain tract of land on the Ohio River near the City of Louisville, Kentucky, and acquired by the United States of America by purchase or condemnation by and with the consent of the Legislature of Kentucky and over which territory the United States of America had exclusive jurisdiction and control. That each and every part of the work and labor performed by this petitioner pursuant to said contract and which was the only work or labor performed by it in the Commonwealth of Kentucky, was executed and performed save as thereinafter set forth wholly within said tract of land. That the cause of action, if any, set out in the petition of the said plaintiff, Haines, and each and every individual and instrumentality either directly or indirectly connected therewith, was each of them located within and upon said Government Reservation, and not within or upon any territority controlled by the Commonwealth of Kentucky or the courts thereof. That the original summons issued upon said plaintiff's petition was served by the deputy sheriff of Jefferson County upon the agent of this petitioner while said deputy sheriff and said agent were each of them standing within and upon said tract of land and not
135 within or upon any territory controlled by the Commonwealth of Kentucky or the courts thereof. That the second or alias summons issued upon the petition of the said plaintiff, Haines, was served upon the agent of this petitioner while said agent was at his home in Louisville, Kentucky, engaged in his private affairs only, and not engaged in any business or agency of any kind whatever for or on behalf of this petitioner.

That thereupon said plaintiff, Haines, filed his general demurrer to said first paragraph of this petitioner's said answer, which demurrer was sustained by the Jefferson Circuit Court.

That thereupon this petitioner filed its petition in this Court for a Writ of Prohibition forbidding said Jefferson Circuit Court from proceeding further with said action, in which this petitioner alleged, among other things, the facts which it has alleged in its answer in the Jefferson Circuit Court, and also alleged that to permit said Court to proceed further with said action would be to contravene the Constitution of the United States, and more particularly Art. 1, Sec. 8, Clause 17 thereof and the 14th Amend-
136 ment thereto, and which said petition for Writ of Prohibition was submitted upon oral and printed arguments and was finally dismissed and final judgment was rendered against your petitioner on the 26th day of May, 1916, by the Court of Appeals of

Kentucky, which is the highest court of law or equity in the said State of Kentucky, wherein it was ordered and adjudged that a Writ of Prohibition forbidding said Jefferson Circuit Court from proceeding further with said cause of action would be, and was denied; and that this Petitioner had an adequate remedy by appeal from any judgment which might be obtained against it in said circuit court.

That your petitioner, therefore, respectfully shows that in said petition for Writ of Prohibition filed in and denied by said Court of appeals of Kentucky, which is the highest court of said State in which a decision of said suit could be had, there was drawn in question privileges and immunities claimed by your petitioner under the Constitution of the United States, and the decision of said Court of Appeals was against said privileges and immunities, and that such decision of said Federal questions was necessary to the judgment rendered by said Court of Appeals of Kentucky. And
137 your petitioner being greatly damaged by such decision is entitled to have the same reviewed by the Supreme Court of the United States.

Wherefore, your petitioner prays that a Writ of Error to said Court of Appeals be allowed; that citation be granted and signed; that the bond herewith presented be approved and that upon compliance with the terms of the Statutes in such cases made and provided, such bond may operate as a stay of the proceedings in said Jefferson Circuit Court; that the errors complained of may be reviewed in the Supreme Court of the United States and the judgment aforesaid of said Court of Appeals of Kentucky be reversed.

THE OHIO RIVER CONTRACT COMPANY,
By Its Attorney in Law and in Fact.
A. E. RICHARDS,
WM. OVERTON HARRIS,
Attorneys and Counsel for Petitioner.

Endorsed and filed on January 27th, 1916. R. W. Keenon, C. C. A.

138 The Writ of Error as prayed for in the foregoing Petition is hereby allowed this 27th day of June, 1916, the Writ of Error to operate as a supersedeas, and the bond for costs is fixed in the sum of Five Hundred ($500.00) dollars, and the same being tendered herewith is approved.

Dated at Frankfort, Ky., this 27th day of June 1916.

W. E. SETTLE,
Acting Chief Justice Court of Appeals of Kentucky.

Endorsed and filed June 27th, 1916. R. W. Keenon, C. C. A.

139 Be it remembered that on the 27th day of June, 1916, the following Bond was filed, towit:

Court of Appeals of Kentucky.

THE OHIO RIVER CONTRACT COMPANY, Plaintiff in Error,
vs.
Honorable THOMAS R. GORDON, Judge of the Jefferson Circuit Court, Defendant in Error.

Bond.

Know all men by these presents that we, the Ohio River Contract Company, as principal, and American Surety Company, of New York, as surety, are held and firmly bound unto the Honorable Thomas R. Gordon, Judge of the Jefferson Circuit Court, in the sum of Five Hundred ($500.00) Dollars, to be paid to said obligee, his successors, representatives and assigns, to the payment of which well and truly to be made we bind ourselves and our assigns by these presents.

Sealed with our seals and dated this 26th day of June, 1916.

140 Whereas, the above named, The Ohio River Contract Company, hath prosecuted a Writ of Error in the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the Court of Appeals of the State of Kentucky.

Now, therefore, the condition of this obligation is such that if the above named The Ohio River Contract Company shall prosecute its said Writ of Error to effect and answer all costs if it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and effect.

THE OHIO RIVER CONTRACT COMPANY,
By A. E. RICHARDS,
WM. OVERTON HARRIS,
Its Attorneys.
AMERICAN SURETY COMPANY OF NEW YORK,
By MASON B. BARRETT, *Resident Vice-President.*
L. P. McGEE, *Resident Assistant Secretary.*

Endorsed: June 27th. Filed. R. W. Keenon, C. C. A.

141 Be it remembered that on June 27th, 1916, the following Assignment of Errors and prayer for reversal, was filed to-wit:

Court of Appeals of Kentucky.

THE OHIO RIVER CONTRACT COMPANY, Plaintiff,
vs.
Honorable THOMAS R. GORDON, Judge of the Jefferson Circuit Court, Defendant.

Assignment of Errors and Prayer for Reversal.

Now comes the Ohio River Contract Company, the Appellant and Plaintiff in Error herein in connection with its Petition for a Writ of Error herein, and respectfully submits that in the record, proceedings, decision and final judgment — the Court of Appeals of Kentucky, which is the highest court in which a decision in said cause could be had, there is manifest error in this, to-wit:

142 First. That the Court erred in denying and dismissing the Petition for Writ of Prohibition filed and prosecuted by this Plaintiff in Error.

Second. That the Court erred in deciding and adjudging that the Plaintiff in Error had and has an adequate remedy by appeal from any judgment which may be obtained against said Plaintiff in Error in the Jefferson Circuit Court.

Third. That the Court erred in adjudging and deciding, in so far as it did adjudge and decide, that the Jefferson Circuit Court had jurisdiction over the person of this Plaintiff in Error in a certain action at law pending therein, wherein one John J. Haines, was plaintiff, and this Plaintiff in Error, The Ohio River Contract Company and one Fred Swisher *are* defendants.

Fourth. That the Court erred in adjudging and deciding, in so far as it did adjudge and decide, that the Jefferson Circuit Court had jurisdiction over the subject matter in said action at law, wherein the said Haines was plaintiff and this Plaintiff in Error and the said Swisher *are* defendants.

143 Fifth. That the Court erred in adjudging and deciding, in so far as it did adjudge and decide, that the statement filed by this Plaintiff in Error pursuant to Sec. 571 Kentucky Statutes, Carroll's 1915 Edition, wherein the location of its Kentucky office was given, and wherein one C. H. Wright was appointed its agent *there at* upon whom process could be served, constituted a waiver of any objection this Plaintiff in Error might otherwise have had to the jurisdiction of the Jefferson Circuit Court over its person, or constituted an acceptance of or agreement to said jurisdiction.

Wherefore, said The Ohio River Contract Company prays that the judgment and decision of said Court of Appeales — Kentucky may be reversed and held for naught and that it may be restored to all things it has lost by reason thereof.

A. E. RICHARDS,
WM. OVERTON HARRIS,
Attorneys and Counsel for the Ohio River Contract Company, Plaintiff in Error.

Filed this 27 day of June, 1916. Rodman W. Keenon, Clerk Court of Appeals of Kentucky.
Endorsed and filed June 27, 1916. R. W. Keenon, C. C. A.

144 Be it remembered that on the 27th day of June 1916 the following Order Allowing Writ of Error was filed, to-wit:

Court of Appeals of Kentucky.

THE OHIO RIVER CONTRACT COMPANY, Plaintiff in Error,
vs.
Honorable THOMAS R. GORDON, Judge of the Jefferson Circuit Court, Defendant in Error.

Order Allowing Writ of Error.

The above-entitled matter coming on to be heard upon the Petition of the Ohio River Contract Company for a Writ of Error from the Supreme Court of the United States to the Court of Appeals of the State of Kentucky, and upon examination of said Petition and of the record in said matter and desiring to give the Petitioner an opportunity to present in the Supreme Court of the United States the questions presented by the record in said matter, it is now ordered that a Writ of Error be, and the same is hereby allowed to this Court from the Supreme Court of the United States, and that the Bond presented by said Petitioner be, and the same is hereby approved.

145 And it is further ordered that said Writ of Error operate as a supersedeas.

W. E. SETTLE,
Acting Chief Justice of the Court of Appeals of the State of Kentucky.

Dated the 27th day of June, 1916.

Filed this 27th day of June 1916. Rodman W. Keenon, Clerk Court of Appeals of Kentucky.
Endorsed and filed June 27th, 1916. R. W. Keenon, C. C. A.

146 Be it remembered that on the 27th, day of June, 1916, the following Writ of Error, was filed, to-wit:

THE OHIO RIVER CONTRACT COMPANY, Plaintiff in Error,

vs.

Honorable THOMAS R. GORDON, Judge of the Jefferson Circuit Court, Defendant in Error.

Writ of Error.

THE UNITED STATES OF AMERICA,
Eastern District of Kentucky,
Sixth Judicial Circuit, ss:

The President of the United States of America to the Honorable the Judges of the Court of Appeals of the State of Kentucky, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals of the State of Kentucky before you, or some of you, being the highest court of law or equity in the said State in which a decision could be had in the suit between The Ohio River Contract Company and the Honorable Thomas R. Gordon, Judge, wherein was
147 drawn in question the validity of a treaty, or statute of or an authority exercised under the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision was in favor of such their validity; or wherein some title, right, privilege or immunity was claimed under the Constitution, or a treaty, or statute of or commission held or authority exercised under the United States, and the decision was against the title, right, privilege or immunity especially set up or claimed by The Ohio River Contract Company under such Constitution, treaty, statute, commission or authority, *and* manifest error hath occurred to the great damage of the said The Ohio River Contract Company, as by its complaint appears, we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the
148 same, to the Supreme Court of the United States, together with this Writ, so that you have the same at Washington on the 25th day of July, 1916, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness The Honorable Edward Douglass White, Chief Justice of

the Supreme Court of the United States, the 27th day of June, in the year of our Lord One Thousand Nine Hundred and sixteen.

JNO. W. MENZIES,
Clerk United States District Court,
Eastern District of Kentucky,
By CHAS. N. WIARD,
Deputy Clerk.

[Seal United States of America, Eastern Div. Dist. Court.]

Allowed.
W. E. SETTLE,
Acting Chief Justice Court
of Appeals of Kentucky.

Endorsed and filed June 27th, 1916. R. W. Keenon, C. C. A.

149 Be it remembered that on the 27th day of June 1916, the following Citation was filed, to wit:

THE UNITED STATES OF AMERICA, *ss:*

To Honorable Thomas R. Gordon, Judge Jefferson Circuit Court, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, D. C. within thirty days from the date hereof, pursuant to a writ of Error filed in the Clerk's office of the Court of Appeals of the State of Kentucky, wherein The Ohio River Contract Company is Plaintiff in Error, and you are Defendant in Error, to show cause, if any there be, why the Judgment rendered against the said Plaintiff in Error as in the said Writ of Error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable W. E. Settle, Acting Chief Justice of the Court of Appeals of Kentucky, this 27th day of June 1916, in the year of our Lord One Thousand Nine Hundred and sixteen.

W. E. SETTLE,
Acting Chief Justice Court
of Appeals of Kentucky.

Service of the foregoing Citation is hereby acknowledged and accepted this 6 day of July, 1916.

THOS. R. GORDON,
Judge of Jefferson Common
Pleas Branch, Second Division.

Endorsed and filed on June 27th, 1916. R. W. Keenon, C. A.

150 Be it remembered that on the 27th day of June, 1916 the following Præcipe was filed, to-wit:

Court of Appeals of Kentucky.

THE OHIO RIVER CONTRACT COMPANY, Plaintiff in Error,
vs.
Honorable THOMAS R. GORDON, Judge of the Jefferson Circuit Court, Defendant in Error.

Præcipe.

To the Clerk of the Court of Appeals of the State of Kentucky, Sitting at Frankfort, Kentucky, Sir:

The Plaintiff in Error, The Ohio River Contract Company, filed its petition herein, and having been awarded a Writ of Error by the Supreme Court of the United States to the Court of Appeals of the State of Kentucky, desires the following portions of the record herein to be incorporated into the transcript for use in the Supreme Court of the United States upon said Writ of Error, to-wit:

Copy from the transcript of the proceedings in the Jefferson Circuit Court and filed with original Petition for Writ of Prohibition marked "Exhibit A":

151 1. The Petition of the plaintiff, John J. Haines, filed July 30, 1914.

2. The original summons issued thereon.

3. Sheriff's return on the original summosn.

4. Order entered March 19th, 1915, entering special appearance of defendants and filing motion to quash the return on the summons.

5. Motion to quash the return on the summons filed March 19, 1915.

6. Order entered March 26, 1915, filing affidavit with exhibits of M. K. Yonts.

7. The affidavit of Morton K. Yonts with exhibits.

8. Order entered March 29, 1915, filing affidavits of Fred Swisher, C. H. Wright and Tom Duddy.

9. The affidavit of Fred Swisher filed March 29, 1915.

10. The affidavit of C. H. Wright filed March 29th, 1915.

11. The affidavit of Tom Duddy filed March 29, 1915.

12. The alias summons issued March 29th, 1915, and the return thereon.

13. Order entered April 1, 1915, filing the affidavits of John C. Oakes, Sloan Graff and C. H. Wright.

152 14. The affidavit of John C. Oakes filed April, 1915.

15. The affidavit of Sloan Graff filed April 1, 1915.

16. The affidavit of C. H. Wright, filed April 1, 1915.

17. Order entered April 12, 1915, filing the affidavit of John J. Haines and the affidavit of Jacob Eichel.

18. The affidavit of John J. Haines filed April 12, 1915.

19. The affidavit of Jacob Eichel filed April 12, 1915.

20. Order entered April 20, 1915, tendering the affidavit of Clarance R. Arnold.

21. The affidavit of Clarance R. Arnold tendered April 20, 1915.

22. Order entered April 26, 1915, tendering the affidavits of Sloan Graff a*b*d C. H. Wright.
23. The affidavit of Sloan Graff tendered April 26, 1915.
24. The affidavit of C. H. Wright tendered April 26, 1915.
25. Order entered May 20, 1915, tendering affidavit of John C. Oakes.
26. The affidavit of John C. Oakes tendered May 20, 1915.
27. Order entered August 2, 1915, overruling defendants motion to quash the return on the summons.
28. Order entered Sept. 18, 1915, filing special demurrer of Ohio River Contract Company to the jurisdiction of the Court.
153 29. Special demurrer filed by Ohio River Contract Company Sept. 18, 1915.

Also copy from supplemental transcript of record of proceedings in Jefferson Circuit Court and filed with the second Petition for Writ of Prohibition marked "Exhibit B."

30. Order entered Nov. 5, 1915, overruling special demurrer of defendant, Ohio River Contract Company.
31. Order entered Nov. 12, 1915, filing answer of defendant, Ohio River Contract Company.
32. Answer of Ohio River *X*ontract Company filed Nov. 12, 1915.
33. Order entered Dec. 4, 1915, filing plaintiff's reply to answer of defendant, Ohio River Contract Company.
34. Order entered Feb'y 18, 1916, withdrawing first paragraph of plaintiff's reply and filing plaintiff's demurrer to first paragraph of the answer of defendant, Ohio River Contract Company, and the order of the Court sustaining same and assigning the action for trial.
35. The demurrer of the plaintiff filed Feb'y 18, 1916.
36. Also copy all material orders entered in the Court of Appeals, including the Opinion of the Court of Appeals dismissing and denying Petition for Writ of Prohibition filed May 26, 1915,
154 and reported in 170 Ky. p. 412.
37. The Petition for Writ of Error with prayer for reversal from Supreme Court to Court of Appeals of Kentucky.
38. The Bond accompanying same.
39. The Assignment of Errors accompanying same.
40. The Order granting and allowing said Writ of Error and approving said Bond.
41. Said W*u*rit of Error.
42. The Citation.
43. This Præcipe.

A. E. RICHARDS,
WM. OVERTON HARRIS,
Counsel for Plaintiff in Error.

Endorsed and filed on June 27th, 1916. R. W. Keenon, C. C. A.

Service of the foregoing Præcipe is hereby acknowledged and accepted, this July 12, 1916.

THOMAS R. GORDON,
Judge of Jefferson Circuit Court Common Pleas
Branch, Second Division.

155 COMMONWEALTH OF KENTUCKY,
The Court of Appeals, set:

I, Rodman W. Keenon, Clerk of the Court of Appeals of Kentucky, certify that the foregoing is a true and correct copy of the record called for in the Præcipe filed by the Petitioner, now Plaintiff in Error, in the case of Ohio River Contract Company, Petitioner, now Plaintiff in Error against Thomas R. Gordon, Judge, Respondent, now Defendant in Error, for use of the said Petitioner, now Plaintiff in Error on an appeal from the judgment of the Court of Appeals of Kentucky to the Supreme Court of the United States.

In testimony whereof, witness my hand and seal of office, done at Frankfort, Ky. on this July 12th, 1916.

[Seal Kentucky Court of Appeals.]

RODMAN W. KEENON,
Clerk Court of Appeals of Kentucky.

156 THE OHIO RIVER CONTRACT COMPANY, Plaintiff in Error,
v.
Honorable THOMAS R. GORDON, Judge of the Jefferson Circuit Court, Defendant in Error.

Writ of Error.

THE UNITED STATES OF AMERICA,
Eastern District of Kentucky,
Sixth Judicial Circuit, ss:

The President of the United States of America to the Honorable, the Judges of the Court of Appeals of the State of Kentucky, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals of the State of Kentucky before you, or some of you, being the highest court of law or equity in the said State in which a decision could be had in the suit between The Ohio River Contract Company and the Honorable Thomas R. Gordon, Judge, wherein was drawn in question the validity of a treaty, or statute of or an authority exercised under the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision was in favor of such their validity; or wherein some title, right, privilege or immunity was claimed under the Constitution, or a treaty, or statute of or commission held or authority exercised under the United States, and the decision was against the title, right, privilege or immunity especially set
157 up or claimed by The Ohio River Contract Company under such Constitution, treaty, statute, commission or authority,

and manifest error hath occurred to the great damage of the said The Ohio River Contract Company, as by its complaint appears, we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this Writ, so that you have the same at Washington on the 25th day of July, 1916, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Edward Douglass White, Chief Justice of the Supreme Court of the United States, the 27th day of June in the year of our Lord One Thousand Nine Hundred and Sixteen.

[Seal United States of America, Eastern K't'y Dist. Court.]

JNO. W. MENZEES,
Clerk United States District Court,
Eastern District of Kentucky.
By CHAS. N. WIARD,
Deputy Clerk.

Allowed
W. E. SETTLE,
Acting Chief Justice,
Court of Appeals of Kentucky.

158 *Citation.*

THE UNITED STATES OF AMERICA, *ss:*

To Honorable Thomas R. Gordon, Judge Jefferson Circuit Court, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, D. C., within thirty days from the date hereof, pursuant to a Writ of Error filed in the Clerk's office of the Court of Appeals of the State of Kentucky, wherein The Ohio River Contract Company is Plaintiff in Error, and you are Defendant in Error, to show cause, if any there be, why the judgment rendered against the said Plaintiff in Error as in the said Writ of Error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable W. E. Settle, Acting Chief Justice of the Court of Appeals of Kentucky, this 27 day of June 1916, in the year of our Lord One Thousand Nine hundred and sixteen.

W. E. SETTLE,
Acting Chief Justice Court of Appeals of Kentucky.

Service of the foregoing Citation is hereby acknowledged and accepted this 6 day of July, 1916.

THOS. R. GORDON,
Judge Jefferson Circuit Court, Common Pleas Branch, Second Division.

Attest this June 27th, 1916.

RODMAN W. KEENON, *C. C. A.*

159 [Endorsed:] Filed Jun- 27, 1916. R. W. Keenon, C. C. A.

Endorsed on cover: File No. 25,424. Kentucky Court of Appeals. Term No. 594. The Ohio River Contract Company, plaintiff in error, vs. Honorable Thomas R. Gordon, Judge Jefferson Circuit Court. Filed July 29th, 1916. File No. 25,424.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916.

No. 594.

THE OHIO RIVER CONTRACT COMPANY, *Plaintiff in Error,*

vs. **NOTICE.**

THE HONORABLE THOMAS R. GORDON,
JUDGE, - - - - - - - *Defendant in Error.*

The Defendant in Error, by his counsel, the Honorable Matthew O'Doherty, is hereby notified that the Plaintiff in Error will on March 5, 1917, or so soon thereafter as counsel can be heard, move the Supreme Court of the United States to advance the hearing and submission of this Writ of Error now pending before it, because the only question in issue involves the jurisdiction of the court below.

A copy of said Motion is attached to this Notice.

A. E. RICHARDS,
W. OVERTON HARRIS,
Counsel for The Ohio River Contract Company.

Notice of this Motion is hereby accepted and a copy of the Motion, together with the Brief filed in support thereof, is hereby acknowledged this 28th day of February, 1917.

MATTHEW O'DOHERTY,
Counsel for Defendant in Error.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916.

No. 594.

THE OHIO RIVER CONTRACT COMPANY, *Plaintiff in Error,*

vs. **MOTION.**

THE HONORABLE THOMAS R. GORDON,
JUDGE, - - - - - - - *Defendant in Error.*

Comes the Plaintiff in Error, The Ohio River Contract Company, by counsel, and respectfully moves the court to advance the hearing and submission of this Writ of Error now pending before it, upon the ground that the only question presented by said Writ is the question of the jurisdiction of the court below, viz.: the jurisdiction of the Circuit Court of Jefferson County, Kentucky, over the person of this Plaintiff in Error and over the subject-matter of a certain action at law now pending before said court.

A. E. RICHARDS,
W. OVERTON HARRIS,
Counsel for The Ohio River Contract Company.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916.

No. 594.

THE OHIO RIVER CONTRACT COMPANY, *Plaintiff in Error,*

vs. **BRIEF.**

THE HONORABLE THOMAS R. GORDON,
JUDGE, - - - - - - - *Defendant in Error.*

This Writ of Error is directed to a judgment of the Court of Appeals of Kentucky, which judgment denied this Plaintiff in Error, The Ohio River Contract Company, a writ of prohibition prohibiting the Circuit Court of Jefferson County, Kentucky, from proceeding with the trial of a certain action at law then and now pending before it. The Ohio River Contract Company is an Indiana corporation and a non-resident of Kentucky and doing business in that State, if at all, within and upon a certain tract of land acquired by the United States Government by purchase and with the consent of the Kentucky Legislature. That action at law was instituted by one Haines against The Ohio River Contract Company and was brought to recover damages for certain personal injuries sustained at the hands of the Contract Company while employed by it in digging a canal for the United States Government upon the tract of land referred to. *The real issue involved in this litigation concerns the*

jurisdiction of the State Trial Court over the person of this Plaintiff in Error and over the subject-matter of the Haines action. We believe that "the only question in issue is the question of the jurisdiction of the court below," within the meaning of Rule 32.

We, therefore, ask that our motion to advance be sustained.

Respectfully submitted,

A. E. RICHARDS,

W. OVERTON HARRIS,

Counsel for The Ohio River Contract Company.

Office Supreme Court, U. S.
FILED
MAR 1 1917
JAMES D. MAHER
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 594.

THE OHIO RIVER CONTRACT COMPANY, PLAINTIFF IN ERROR,

vs.

HON. THOMAS R. GORDON, JUDGE, &C.

MOTION TO DISCHARGE RESTRAINING ORDER OR TO DISMISS OR AFFIRM.

MATHEW O'DOHERTY,
Counsel for Defendant in Error.

(25,424.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 594.

OHIO RIVER CONTRACT COMPANY, PLAINTIFF IN ERROR,

vs.

HON. THOMAS R. GORDON, JUDGE OF THE JEFFERSON CIRCUIT COURT, DEFENDANT IN ERROR.

MOTION.

Comes the defendant in error, Thomas R. Gordon, and files notice, and thereupon moves the court

First. To discharge the restraining order entered herein.

Second. To affirm the judgment of the Court of Appeals of Kentucky, denying the writ of prohibition against the defendant in error, on the ground that it is manifest that the writ of error was taken for delay only, and that the questions on which the decision of the cause depends are so frivolous as not to need further argument;

Or, will move the court that the writ of error herein be dismissed.

MATHEW O'DOHERTY,
Counsel for Defendant in Error.

SUPREME COURT OF THE UNITED STATES.

OHIO RIVER CONTRACT COMPANY, *Plaintiff in Error,*

vs.

HON. THOMAS R. GORDON, *Judge of the Jefferson Circuit Court, Defendant in Error.*

NOTICE.

The plaintiff in error is hereby notified that on Monday, March 5, 1917, the defendant in error will move the court

First. To discharge the restraining order entered herein.

Second. To affirm the judgment of the Court of Appeals of Kentucky, denying the writ of prohibition against the defendant in error, on the ground that it is manifest that the writ of error was taken for delay only, and that the questions on which the decision of the cause depends are so frivolous as not to need further argument;

Or, will move the court that the writ of error herein be dismissed.

And the defendant in error will file, in support of his said motion, his printed brief, a copy of which is attached hereto, and delivered to counsel for plaintiff in error with this notice.

In testimony of all of which witness the signature of the said Thomas R. Gordon, judge of the Jefferson Circuit Court, by Mathew O'Doherty, his counsel, this 7th day of February, 1917.

THOMAS R. GORDON,
By MATHEW O'DOHERTY,
Counsel for Defendant in Error.

We acknowledge receipt of a copy of the above notice and of the printed brief of counsel for defendant in error this February 7th, 1917.

W. OVERTON HARRIS,
Counsel for Plaintiff in Error.

[Endorsed:] File No. 25,424. Supreme Court U. S. October term, 1916. Term No. 594. The Ohio River Contract Co., pl'ff in error, *vs.* Hon. Thos. R. Gordon, judge, etc. Motion to discharge restraining order, to dismiss or affirm, notice and proof of service of same. Filed March 1, 1917.

JUDD & DETWEILER, INC., PRINTERS,
WASHINGTON, D. C.

Office Supreme Court, U. S.
FILED
JAN 30 1917
JAMES D. MAHER
Clerk

SUPREME COURT OF THE UNITED STATES

No. 594.

THE OHIO RIVER CONTRACT COMPANY, *Plaintiff in Error,*

versus

THE HONORABLE THOMAS R. GORDON, JUDGE OF THE JEFFERSON CIRCUIT COURT, *Defendant in Error.*

OBJECTIONS OF PLAINTIFF IN ERROR TO AFFIDAVIT TENDERED BY DEFENDANT IN ERROR ON PENDING MOTION OF PLAINTIFF IN ERROR.

Plaintiff in Error hereby objects in writing to the filing of the affidavit of one J. H. Henderson, Deputy Clerk of the Court of Appeals of Kentucky, tendered by Defendant in Error as a defense to the motion made by Plaintiff in Error, and for its objections states:

(1) That it was not served with notice of the intention to file said affidavit nor with a copy of same until January 25, 1917, at about the hour of 4 P.M., and not in time for Plaintiff in Error to controvert said affidavit as it otherwise could and would have done.

(2) That said affidavit is irrelevant and immaterial in that it challenges the validity of the order of supersedeas *actually allowed and obtained* in the State court, and the propriety of said action by the State court, which questions can be raised only by a motion to dismiss or other direct proceeding against the validity of the existence of said supersedeas.

A. E. RICHARDS,
WM. OVERTON HARRIS,
Attorneys and Counsel for the Ohio River Contract Co.

SUBJECT INDEX.

I.

A Writ of Error, with Supersedeas, prosecuted from a judgment denying a Writ of Prohibition, has the effect of suspending proceedings in the action sought to be prohibited until the Writ of Error has been decided.

II.

The Supreme Court of the United States has authority to protect its appellate jurisdiction by such means as the circumstances of the particular case may prescribe.

Ex parte, The Milwaukee & Minnesota R. R. Co., 5 Wallace, 825; 18 Law. Ed. 676.
Goddard v. Ordway, 94 U. S. 672.

III.

Prohibition is the only adequate remedy for this plaintiff in error.

Southern Coal & Coke Co. v. Bowling Green Coal Co., 161 Ky. 477, 170 S. W. 1185.
Western Indemnity Co. v. Rupp, 235 U. S. 261.

CASES CITED.

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Goddard v. Ordway, 94 U. S. 672	11
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SUPREME COURT OF THE UNITED STATES

THE OHIO RIVER CONTRACT COMPANY, *Plaintiff in Error,*

versus

THE HONORABLE THOMAS R. GORDON, JUDGE OF THE JEFFERSON CIRCUIT COURT, *Defendant in Error.*

NOTICE OF MOTION.

The defendant in error, The Honorable Thomas R. Gordon, is hereby notified that the plaitiff in error, The Ohio River Contract Company, on Monday, January 29, 1917, at the motion hour, or so soon thereafter as the attention of the court can be obtained, will move the Supreme Court of the United States to issue either

(*1*) An order against said defendant in error restraining him from proceeding further with the trial of an action at law now pending before him as Judge of the Jefferson Circuit Court, Common Pleas Branch, Second Division, in which one John J. Haines is plaintiff, and this plaintiff in error, The Ohio River Contract Company, is defendant, until said Supreme Court of the United States has heard and determined the writ of error duly prosecuted from it to the judgment of the Court of Appeals of Kentucky, which judgment refused to prohibit

or restrain said defendant in error as aforesaid, and to which judgment an order of supersedeas was duly issued; or

(*2*) A rule against said defendant in error to show cause why the restraining order, as aforesaid, should not be issued; or

(*3*) A rule against said defendant in error to show cause why he is proceeding with the trial of said action at law; or

(*4*) A rule against said defendant in error to show cause why he should not be adjudged in contempt of said order of supersedeas.

Defendant in error is further notified that plaintiff in error will file in support of said motion the affidavit of Wm. Overton Harris, a copy of which is attached hereto.

A. E. Richards,
Wm. Overton Harris,
Attorneys and Counsel for The Ohio River Contract Company.

Service of this notice, together with a copy thereof and a copy of the affidavit mentioned therein, is hereby accepted and acknowledged this 18th day of January, 1917, and motions objected to.

Thos. R. Gordon,
Judge Jefferson Circuit Court, Common Pleas Branch, Second Division.

By O'Doherty & Yonts,
Attorneys.

SUPREME COURT OF THE UNITED STATES

THE OHIO RIVER CONTRACT COMPANY, *Plaintiff in Error,*

versus

THE HONORABLE THOMAS R. GORDON, JUDGE OF THE JEFFERSON CIRCUIT COURT, *Defendant in Error.*

MOTION.

Comes the plaintiff in error, The Ohio River Contract Company, and respectfully moves the court to issue either

(*1*) An order against said defendant in error restraining him from proceeding further with the trial of an action at law now pending before him as Judge of the Jefferson Circuit Court, Common Pleas Branch, Second Division, in which one John J. Haines is plaintiff, and this plaintiff in error, The Ohio River Contract Company, is defendant, until said Supreme Court of the United States has heard and determined the writ of error duly prosecuted from it to the judgment of the Court of Appeals of Kentucky, which judgment refused to prohibit or restrain said defendant in error as aforesaid, and to which judgment an order of supersedeas was duly issued; or

(*2*) A rule against said defendant in error to show cause why the restraining order, as aforesaid, should not be issued; or

(*3*) A rule against said defendant in error to show cause why he is proceeding with the trial of said action at law; or

(*4*) A rule against said defendant in error to show cause why he should not be adjudged in contempt of said order of supersedeas.

And in support of said motion said plaintiff in error tenders herewith and asks leave to file the affidavit of Wm. Overton Harris.

A. E. Richards,
Wm. Overton Harris,
Attorneys and Counsel for The Ohio River Contract Company.

SUPREME COURT OF THE UNITED STATES

THE OHIO RIVER CONTRACT COMPANY, *Plaintiff in Error,*

versus

THE HONORABLE THOMAS R. GORDON, JUDGE OF THE JEFFERSON CIRCUIT COURT, *Defendant in Error.*

AFFIDAVIT.

Affiant, Wm. Overton Harris, states that he is a practicing attorney and member of the bar of the Jefferson Circuit Court, and that he is a member of the firm of Richards & Harris, attorneys of record for The Ohio River Contract Company in an action at law now pending in the Jefferson Circuit Court, Common Pleas Branch, Second Division, wherein one John J. Haines is plaintiff, and The Ohio River Contract Company is a defendant. Affiant states that the judge presiding over said court is The Honorable Thomas R. Gordon.

Affiant states that on the 14th day of October, 1916, by order duly entered by the clerk of said Jefferson Circuit Court, pursuant to the directions of said, The Honorable Thomas R. Gordon, as the judge presiding over said court, said action at law was placed upon the trial docket

of said court and that same was assigned for trial to the 7th day of February, 1917. Affiant states that said, The Honorable Thomas R. Gordon, has publicly and formally announced that it is his intention to proceed with the trial of said action at law on said date.

WM. OVERTON HARRIS.

Subscribed and sworn to before me by Wm. Overton Harris this 17th day of January, 1917. My commission expires January 23, 1918.

S. G. CONNAUGHTON,
Notary Public, Jefferson County, Kentucky.

(SEAL)

SUPREME COURT OF THE UNITED STATES

No. 594.

THE OHIO RIVER CONTRACT COMPANY, *Plaintiff in Error,*

versus

THE HONORABLE THOMAS R. GORDON, JUDGE OF THE JEFFERSON CIRCUIT COURT, *Defendant in Error.*

BRIEF FOR PLAINTIFF IN ERROR ON PENDING MOTION.

This record is before the court at this time on the motion of the plaintiff in error for relief in one of four alternative forms, viz., either an order against the defendant in error restraining him from proceeding further with the trial of an action at law now pending before him as judge of the Circuit Court of Jefferson County, Ky.; or, a rule against him to show cause why such a restraining order should not be issued; or, a rule against him to show cause why he is proceeding with the trial of said action; or, a rule against him to show cause why he should not be adjudged in contempt of this court. Our motion is for this alternative relief because the lack of precedent leaves us ignorant of the proper practice; by including in our motion these four forms of relief we hope that the

court will grant that form, if any, to which we are entitled, and deny the others. It is needless to say that Judge Gordon's contempt, if any, of this court, is only technical, and our motion for a rule against him upon this ground is presented with all deference, and only because we conceive that such may be the proper method of securing the attention of this court to the predicament of this plaintiff in error.

The record in this case, heretofore filed, shows that an action at law by one John J. Haines against this plaintiff in error (The Ohio River Contract Company) is pending in the Jefferson Circuit Court at Louisville, Ky., before this defendant in error (Judge Gordon) and that a petition for Writ of Prohibition alleging, and based upon, certain Federal questions, was denied by the Court of Appeals of Kentucky, which is the court of last resort in that State. It further appears that a Writ of Error from this court to that judgment of the Court of Appeals was duly allowed and issued and that an order of Supersedeas was also granted. This endorsement appears upon the petition for the writ of error (Trans. Rec., printed page 54):

> "The writ of error as prayed for in the foregoing petition is hereby allowed this 27th day of June, 1916, *the writ of error to operate as a supersedeas,* and the bond for costs is fixed in the sum of five hundred dollars, and the same being tendered herewith, is approved.
>
> "Dated at Frankfort, Ky., this 27th day of June, 1916.
>
> W. E. Settle,
> Acting Chief Justice Court of Appeals of Kentucky."

A separate order was also signed by the Acting Chief Justice of the State court, reciting the allowance of the Writ of Error from the Supreme Court of the United States, and further noting (Trans. Rec., printed page 57):

> "It is further *ordered that said Writ of Error operate as a supersedeas.*"

From the affidavit filed in support of the motion now before the court it appears that the Haines suit was, on October 14, 1916, by order duly entered by the Clerk of the Jefferson Circuit Court, pursuant to the directions of Judge Gordon, placed upon the trial docket of said court and assigned for trial to February 7, 1917, and that Judge Gordon has announced that it is his intention to proceed with the trial of said case on that day.

The Basis of This Motion is:

The prosecution of the Writ of Error, with Supersedeas, from the judgment of the Court of Appeals of Kentucky declining to prohibit Judge Gordon from proceedings with the trial of the Haines action, had the effect of prohibiting Judge Gordon from proceeding further in that action until this court has disposed of said Writ of Error.

That a writ of error lies from this court to a judgment of a State court denying a petition for writ of prohibition where Federal questions are involved, has been lately decided by this court. Mt. Vernon-Woodbury Cotton Duck Co. v. Alabama Interstate Power Co., 240 U. S.

30. Wherein consider, Levy v. Superior Court of San Francisco, 167 U. S. 175.

For the purposes of this motion—which is a proceeding based upon a Writ of Error and order of Supersedeas actually granted and issued respectively—the validity of the granting of the Writ of Error and of the issuance of the Supersedeas is assumed. So long as the Supersedeas is actually in existence it must be obeyed; the propriety of its issuance is not subject to collateral attack. It remains, therefore, to see whether this court has authority to protect its own appellate jurisdiction by preventing acts in derogation of the order of supersedeas granted below. It would seem clear upon principal and authority that such power obtains.

Ex parte The Milwaukee & Minnesota R. R. Co., Petitioner, 5 Wallace, 825, 18 Law Ed. 676. This case presented a petition for a writ of mandamus to issue from this court to the Circuit Court below, compelling it to approve and allow a bond for supersedeas duly perfected. This court stated that although it did not agree with the Circuit Judge's reason for rejecting the bond the court was not inclined to interfere by mandamus with the discretion of the Circuit Judge. But it was stated that ample remedy remained in the hands of this court, the opinion by Mr. Justice Miller stating:

> "The case being properly in this court by appeal we have, by the 14th section of the Judiciary Act, *a right to issue any writ which may be necessary to render our appellate jurisdiction effectual.* For this purpose the writ of supersedeas is eminently proper

> in a case where the circumstances justify it, as we think they do in the present instance." (Italics ours.)

It was ordered that upon the filing of the proper bond supersedeas should issue from this court commanding a stay of proceedings below until further order entered.

Goddard v. Ordway, 94 U. S. 672, presented a suit in equity in the courts of the District of Columbia to subject certain profits as they accrued from the performance of a government contract to the payment of appellant's debt. A receiver was appointed to collect the monies due from the United States under the contract, but upon final hearing below the bill was dismissed. From that decree "this appeal, which operates as a supersedeas, was taken." When the supersedeas was perfected, the receiver had a large sum of money on hand and the appellant fearing that an order was about to be made disbursing the money, notwithstanding the appeal, sought the interference of this court. The opinion by Chief Justice Waite points out that the lower court could take no step which would place the money beyond the control of any decree that might be made by this court, "for that would be to defeat our jurisdiction." The opinion then declares that supersedeas follows as a matter of law from a compliance by the appellant with the provisions of the act of Congress and this court was not required to perfect the right of a party to that which the law has given him—

> "but if the court below is proceeding, through mistake or otherwise, to execute its judgment or decree notwithstanding the supersedeas, *we may, under*

Section 716, Rev. Stat., issue an appropriate writ to restrain that action, for it would be 'a writ necessary for the exercise of our jurisdiction.' The precise form of the writ to be issued, or relief to be granted, must necessarily depend upon the particular circumstances of any case that may arise." (Italics ours.)

Inamuch as the rule had already been served upon the lower court restraining any disposition of the fund in the hands of the receiver, no further writ was issued.

We have been able to find no decided case in which a judgment denying a Writ of Prohibition was superseded. But Writ of Error from this court lies to such a judgment, provided a Federal question is presented; and in the instant case the Supersedeas was actually allowed. Unless the Supersedeas has the effect of restraining the prosecution of the action which was sought to be prohibited the Writ of Error will have been in vain. If Judge Gordon is permitted to try the Haines action on February 7th, and actually does so, in that event the Federal questions raised in the Writ of Error pending in this court will be moot. Defendant in error may then argue that the Writ of Error to the judgment of the Court of Appeals declining to prohibit him from trying the Haines action should be dismissed because he has already tried the Haines action. The only way the rights under the Constitution of the United States of this plaintiff in error can be protected, is by preventing the trial of the Haines action until an adjudication of the Writ of Error now pending in this court—because in Kentucky an appeal is an entry of appearance and the appellant finds

himself before the court even if the cause has been reversed and remanded. Southern Coal & Coke Co. v. Bowling Green Coal Co., 161 Ky. 477, 170 S. W. 1185. Wherein consider Western Indemnity Co. v. Rupp, 235 U. S. 261.

The record heretofore filed shows that the main defense of this plaintiff in error as defendant in the Haines action, is the lack of jurisdiction of the State court over its person and over the subject matter of the action. If the Haines case is ever tried by the Jefferson Circuit Court the jurisdictional questions are forever disposed of, for an appeal will determine nothing more than an academic discussion. Prohibition is the only real remedy which exists for this plaintiff in error, and unless the order of Supersedeas which has been allowed upon this Writ of Error restrains the State trial court until this court has passed upon the Writ, the constitutional rights of this plaintiff in error therein set up are gone forever.

We ask that one of the four alternative forms of relief prayed for in this motion be granted.

Respectfully submitted,

A. E. Richards,

Wm. Overton Harris,

Attorneys and Counsel for The Ohio River Contract Company.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 594.

THE OHIO RIVER CONTRACT COMPANY, PLAINTIFF IN ERROR,

vs.

THE HONORABLE THOMAS R. GORDON, JUDGE OF THE JEFFERSON CIRCUIT COURT, DEFENDANT IN ERROR.

BRIEF FOR DEFENDANT ON PENDING MOTIONS.

The plaintiff in error seeks to review in this court a judgment of the Kentucky Court of Appeals refusing to prohibit the defendant in error from trying a certain cause pending in the court presided over by him.

When the petition for the writ of prohibition was filed in the court of appeals, in April, 1916, it entered an order by which Judge Gordon was "temporarily restrained and prohibited from proceeding further in the action (naming it) until the further order of the court" (Trans., p. 40).

The final judgment denied the relief and gave respondent his costs.

The writ of error from this court was allowed with the

usual provision "that said writ of error operate as a supersedeas."

The court of appeals in subsequent proceedings has determined that the final judgment denying the writ of prohibition was itself a dissolution of the temporary restraining order (Ohio River C. Co. *vs.* Gordon, Judge, 172 Ky., 407-8); and the only restraint, if any, now against Judge Gordon must arise from the order of supersedeas.

Plaintiff in error now comes to this court with its motion asking that (1) it be held that the order of supersedeas revived the temporary restraining order and continued it in force until this case is determined here; or (2) if this is not tenable, then it would have this court enter such orders as may be necessary to that end.

A SUPERSEDEAS DOES NOT GIVE EFFECT TO TEMPORARY ORDERS WHICH ARE DISSOLVED BY THE FINAL DECREE.

It appears to us that the first question here is settled against our opponent's contention by the rule declared in—

Hovey *vs.* McDonald, 109 U. S., 150,

where it was held that the superseding of a decree dismissing a bill for injunction did not continue in force a temporary restraining order.

THE POWER TO CONTINUE THE TEMPORARY RESTRAINING ORDER IN FORCE PENDING APPEAL LIES ONLY IN THE TRIAL COURT.

In asking this court to now enter such orders as will restrain the defendant in error, we note that plaintiff has offered no precedent as a guide. There is no provision of statute or practice authorizing it, so far as we have been able to find. It seems that the statutes are intended to give

no authority to the appellate courts, beyond the allowance of the order of supersedeas, which, as we have seen, does not revive temporary orders.

The only notice which this item of practice seems to have received is found in Equity Rule No. 74, wherein this court discloses its purpose to limit the authority for continuing temporary injunctions in force during the appeal to "a justice or judge who took part in the decision of the case." Moreover it makes the exercise of such authority "discretionary" with such justice or judge; and, accordingly, it would seem that the failure to include such provision in the writ of error here is the end of that matter. We ask that the motions of the plaintiff be overruled.

Respectfully submitted,

MATTHEW O'DOHERTY,
Counsel for Defendant in Error.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916.

No. 594.

THE OHIO RIVER CONTRACT COMPANY, *Plaintiff in Error,*

vs. **NOTICE.**

THE HONORABLE THOMAS R. GORDON,
JUDGE, - - - - - - - *Defendant in Error.*

The Defendant in Error, The Honorable Thomas R. Gordon, by counsel of record, Matthew O'Doherty, is hereby notified that on March 5, 1917, or so soon thereafter as counsel may be heard, the Plaintiff in Error, The Ohio River Contract Company, will move the court to transfer the cause presented in the Writ of Error now pending before the court to the Summary Docket for hearing. A copy of said Motion is attached to this Notice.

A. E. RICHARDS,
W. OVERTON HARRIS,
Attorneys and Counsel for The Ohio River Contract Company.

Service of this Notice and receipt of a copy of the Motion therein referred to is accepted and acknowledged this 15th day of February, 1917.

MATTHEW O'DOHERTY,
Attorney and Counsel for Defendant in Error.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916.

No. 594.

THE OHIO RIVER CONTRACT COMPANY, *Plaintiff in Error,*

vs.

THE HONORABLE THOMAS R. GORDON,
JUDGE, - - - - - - - *Defendant in Error.*

MOTION TO TRANSFER TO SUMMARY DOCKET.

Comes the Plaintff in Error, The Ohio River Contract Company, and respectfully moves the court to transfer and assign the cause presented in the Writ of Error now pending before the court to the Summary Docket for hearing, and as a ground for said motion states:

First:

That the dependent rights of the parties are such as to urge an early determination of the issues presented.

Second:

That the cause is of such a character as not to require extended argument.

A. E. RICHARDS,
W. OVERTON HARRIS,
Attorneys and Counsel for The Ohio River Contract Company.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916.

No. 594.

THE OHIO RIVER CONTRACT COMPANY, *Plaintiff in Error,*

vs.

THE HONORABLE THOMAS R. GORDON,
JUDGE, - - - - - - - *Defendant in Error.*

BRIEF.

This record is before the court on motion by the Plaintiff in Error to transfer the cause presented in this Writ of Error to the Summary Docket for hearing and submission. The question presented involves the jurisdiction of the State Trial Court over the person of this Plaintiff in Error and over the subject-matter of a certain action at law pending before it. The points at issue present only legal propositions which deserve early adjudication, and we believe same can be presented to the court within the time allowed cases assigned to the Summary Docket.

We, therefore, ask that our motion be sustained and that the cause be assigned for hearing to the Summary Docket.

Respectfully submitted,

A. E. RICHARDS,
W. OVERTON HARRIS,
Attorneys and Counsel for The Ohio River Contract Company.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916.

No. 594.

THE OHIO RIVER CONTRACT COMPANY, *Plaintiff in Error,*

vs.

HONORABLE THOMAS R. GORDON, JUDGE
JEFFERSON CIRCUIT COURT, - *Defendant in Error.*

BRIEF FOR PLAINTIFF IN ERROR ON PENDING MOTIONS BY DEFENDANT IN ERROR.

This record is before the court on these motions made by the Defendant in Error, viz.: (1) to discharge the Restraining Order granted by this court on February 5, 1917; and (2) either (a) to affirm the judgment of the State Court because this Writ of Error was taken for delay only and because the questions raised therein are frivolous, or (b) to dismiss the Writ of Error outright.

We can conceive of no reason for discharging the Restraining Order of February 5, 1917, which was not urged against granting that Order in the first instance, and we do not consider it necessary to defend now the action taken by this court at that time after due consideration of the merits. This leaves for consideration the Motion to Affirm or Dismiss.

When Rule 6 as promulgated by this court provided that "there may be united with" a Motion to Dismiss a Motion to Affirm, it was decided that unless the propriety of the dismissal of the Writ of Error or Appeal was at least colorable, the alternative Motion to Affirm would be ignored.

> Hinckley v. Morton, 103 U. S. 764.
> New Irleans v. Louisiana Construction Co., 129 U. S. 45.
> 3 Foster, Fed. Practice, p. 2518.

But the rigor of this construction of the old rule seems to have been modified in Chanute City v. Trader, 132 U. S. 210, and Blythe v. Hinckley, 180 U. S. 333, and Equitable Life Assurance Society v. Brown, 187 U. S. 308. The modified doctrine is thus stated in the latter case (p. 311):

> "It has also been decided by this court that even where the motion to dismiss is denied and where such motion should be treated as without color * * * yet, notwithstanding the provisions of Subdivision 5 of Rule 6, the power to consider and sustain a motion to affirm obtains where the assignments of error on the merits are obviously and unquestionably frivolous, or when it is patent that the Writ of Error has been prosecuted for mere delay, or where it is evident on the face of the record that the question on the merits is not open to possible contention, because it has previously been so specifically and adversely ruled on by the court as to absolutely foreclose further contention on the subject."

It seems that although the Motion to Dismiss lacks all color, yet the Motion to Affirm will be entertained if the Writ of Error either (1) presents questions which are

obviously frivolous; or (2) it is patent that the writ was prosecuted for delay only; or (3) where the question on the merits has been so specifically and adversely ruled on by the court as to foreclose further contention on the subject.

We are at a loss to know upon what reason or authority Defendant in Error has moved to dismiss this Writ of Error. The Federal Constitution (Art. 1, Sec. 8, Clause 17) and the Fourteenth Amendment was repeatedly raised and insisted on at every stage of this litigation in both of the State Courts; and that a Writ of Error lies to a judgment denying Writ of Prohibition has been very lately decided by this court in

> Mt. Vernon Woodbury Cotton Duck Co. v. Ala. Interstate Power Co., 240 U. S. 30, citing Levy v. Superior Court of San Francisco, 167 U. S. 175.

The Motion to Dismiss would, therefore, seem to lack color.

Therefore, unless the instant case falls within that class of cases established in Equitable Life Assurance Society v. Brown, *supra*, viz., cases presenting questions which are either obviously frivolous or are no longer open to contention, having been adversely decided, or when it is patent that the Writ of Error has been prosecuted for mere delay—we respectfully submit that this Motion to Affirm should be ignored.

THE FACTS.

We shall briefly recite the facts and governing authorities presented in this record.

Omitting certain irrelevancies, the facts are these: There was instituted and is now pending in the Circuit Court of Jefferson County, Ky., an action for damages for personal injuries alleged to have been sustained by one Haines at the hands of and while working for The Ohio River Contract Company. That corporation was organized under the laws of Indiana and of that State only, and does business in Kentucky, if at all, within and upon a tract of land adjoining the Ohio River at Louisville, Ky., and acquired by the United States Government by purchase and with the consent of the Kentucky Legislature prior to the date of the cause of action alleged. This tract we shall refer to as the Canal Reservation.

Summons issued on the Haines petition and was served upon the agent of the Contract Company *within the Canal Reservation.* The company filed its motion in the State Court to quash the return on this summons, and in support filed various affidavits setting out all of the facts. While this motion was pending an alias summons was served upon the same corporate agent outside of the Canal Reservation, but *at the man's home* in the city of Louisville, where he was found *after working hours* and *engaged in his private affairs.*

The motion to quash was overruled and the defendant, Contract Company, then filed its special demurrer to the

jurisdiction of the trial court over its person and the subject-matter of the action. After this demurrer had been overruled the defendant, Contract Company, filed its answer, in the first paragraph of which it set out all of the facts and pleaded what at common law would have been a plea in abatement of the court's jurisdiction. The plaintiff's general demurrer to this paragraph of the answer was sustained and a final order entered that the court had jurisdiction over the defendant's person and the subject-matter and assigning the case to a day for trial.

The Contract Company then filed its petition for Writ of Prohibition in the Court of Appeals of Kentucky, in which petition the facts were set out in detail and the United States Constitution, Article 1, Section 8, Clause 17, and Section 1 of the Fourteenth Amendment thereto was specifically invoked. A temporary Restraining Order was entered by the Court of Appeals of Kentucky, but on final hearing the petition for Writ of Prohibition was dismissed and the Writ denied upon the ground that the petitioner's proper remedy was by appeal, in the event a final judgment went against it. See 170 Ky. 412. The temporary Restraining Order previously granted was not referred to, but the court subsequently decided that the effect of the denial of the Writ of Prohibition was to discharge the Restraining Order. See 172 Ky. 405.

To recapitulate: This Plaintiff in Error, a citizen of Indiana, has been sued in the Kentucky Court for personal injuries sustained by the plaintiff while working within a Government Canal Reservation. The Plaintiff

in Error is a non-resident of Kentucky and doing no business in Kentucky, unless building a canal under a Government contract and inside of a Government reservation constitutes such a fact. The original summons was served upon the company's agent while standing within the Canal Reservation and outside of the State of Kentucky, and the alias summons was served on the same man while at his home after working hours, and while he was engaged in his private affairs.

THE OHIO RIVER CONTRACT COMPANY IS NOT BEFORE THE TRIAL COURT.

That service upon an individual agent of a corporation does not bind the corporation unless the agent was served while in his representative capacity—that is, unless the agent was served while in the performance of his agency, see: Mechanical Appliance Co. v. Castleman, 215 U. S. 441; Herndon Carter Co. v. Norris, 224 U. S. 499; St. Louis R. R. Co. v. Alexander, 227 U. S. 226. As was said in International Harvester Co. v. Ky., 234 U. S. 579, 583:

> "Mere presence of an agent upon personal affairs does not carry the corporation into the foreign State";

and in Conley v. Mathieson Alkali Works, 190 U. S. 406, 411:

> "The residence of an officer of a corporation does not necessarily give the corporation a domicile in the State. He must be there officially—there represent-

ing the corporation in its business. St. Clair v. Cox, 106 U. S. 350. In other words, the corporation must be doing business there. * * *"

In derogation of the jurisdiction of the State Court the Plaintiff in Error has, at every stage of this litigation, pleaded and relied upon the appropriate provisions in the United States Constitution and the Fourteenth Amendment thereto.

PROHIBITION ONLY ADEQUATE REMEDY.

In Kentucky an appeal is an entry of appearance and the successful appellant is before the trial court upon a remand of the case. See Southern Coal & Coke Co. v. Bowling Green Coal Co., 161 Ky. 477—wherein consider Western Indemnity Co. v. Rupp, 235 U. S. 261. Wherefore, if the Haines case goes to trial and judgment is rendered for the plaintiff and the defendant appeals and the Appellate Court reverses the case because the trial court lacked jurisdiction, yet by virtue of the very process whereby the lack of jurisdiction was established that same jurisdiction attaches and is made sufficient and at the new trial the defendant is before the court. To say, as the Court of Appeals of Kentucky has said, that an appeal under such circumstances is an adequate remedy for this Plaintiff in Error and a justification for the denial of the Writ of Prohibition is, we say with all respect, a travesty on justice.

THE CANAL RESERVATION IS FEDERAL TERRITORY.

Article 1, Section 8, Clause 17, of the United States Constitution gives to the Federal courts exclusive legislative authority "over all places purchased by the consent of the Legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards and other needful buildings." That the phrase "other needful buildings" includes a United States canal and that exclusive legislative authority implies complete authority was decided by the United States District Court for the Western District of Kentucky in United States v. Tucker, 122 Fed. Rep. 518, 522, where it is written:

> "While there might possibly be some difficulty (under the rule *ejusdem generis*) if the question were *res integra*, as to the strictly proper construction and applicability to the case of locks and dams of the words, 'for the erection of forts, magazines, arsenals, dockyards, and other needful buildings,' used in the clause of the Constitution above quoted, the cases seem to leave no doubt that the broadest construction has been wisely put upon that language —one which makes it cover all structures and all places necessary for carrying on the business of the national Government."

There the issue was presented on demurrer to a Federal indictment for a crime committed within a canal reservation lying within the State of Kentucky, and it was decided that exclusive Federal jurisdiction obtained where the territory had been acquired as provided in

the United States Constitution, by purchase with the consent of the State Legislature. This case was cited with approval in United States v. Andem, 158 Fed. Rep. 996, where a similar question was presented.

The Tucker case was also cited in a recent decision by the District Court for the Western District of Washington, in the case of Steele v. Halligan, 229 Fed. Rep. 1011, where Federal jurisdiction was retained over a damage suit for personal injuries sustained by a convict at the hands of the warden of a Federal penitentiary located within Federal territory. This case more closely approaches the instant case than any other we have been able to find.

Upon this general subject see also W. U. Tel. Co. v. Chiles, 214 U. S. 274, where the jurisdiction of Virginia over the Norfolk Navy Yard was under consideration.

Ft. Leavenworth R. R. Co. v. Lowe, 114 U. S. 525, is the progenitor of the doctrine of Federal jurisdiction over Federal territory, and is the case most often cited in a discussion of this question. But, as pointed out in the Tucker case, and in the Steele case, *supra*, the Ft. Leavenworth Railroad case and the other cases arising in Kansas involved territory which had been acquired by the United States *by treaty with France*, and not by the means provided in the United States Constitution, viz., purchase with the consent of the State. This fact is vital in a consideration of the effect of those decisions.

Southern Surety Co. v. Oklahoma, 241 U. S. 582, is a recent decision by this court worthy of notice here. The issue presented was whether or not the courts of Okla-

homa succeeded in jurisdiction to a certain offense which had been committed within the State before it was granted independent sovereignty, and the prosecution of which offense had been begun in the United States courts. After deciding that the Oklahoma courts had jurisdiction, Mr. Justice VanDeventer used this language:

> "Of course, we exclude from present consideration forts, arsenals and like places within the exterior limits of a State, but over which exclusive jurisdiction has been ceded to the United States, because they are regarded not as part of the State, but as excepted out of it."

There are several decisions by State and inferior Federal courts which have a general bearing upon this question, but we refrain from reference to them at this time, as we need proceed no further than to convince the court that the Motion to Dismiss or Affirm is not well taken.

If we have demonstrated that this Writ of Error presents a jurisdictional issue for decision by this court and that the questions presented are neither frivolous nor have they been so often decided adversely to our contention as to preclude further argument, we ask that all of the motions made by the Defendant in Error be overruled.

Respectfully submitted,

A. E. Richards,

W. Overton Harris,

Attorneys and Counsel for The Ohio River Contract Company.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916.

No. 594.

THE OHIO RIVER CONTRACT COMPANY, *Plaintiff in Error,*

versus

HONORABLE THOMAS R. GORDON, JUDGE
JEFFERSON CIRCUIT COURT, - - *Defendant in Error.*

Brief for Plaintiff in Error.

STATEMENT.

This record is before the court on Writ of Error to the judgment of the Court of Appeals of Kentucky overruling the petition filed in that court by this plaintiff in error for a Writ of Prohibition forbidding the defendant in error, as a judge of the Circuit Court for Jefferson County, Ky., to proceed further with a certain action at law then and now pending before him. That judgment of the Court of Appeals of Kentucky denying Prohibition is found on page 44 of the printed record. The opinion of the court is found on page 45 of the printed record and is officially reported in 170 Ky. 412; also in 186 S. W. 178.

This record has twice been before the court; once on motion by plaintiff in error for an order temporarily restraining the State trial court from proceeding with the

trial of the action originally sought to be prohibited (which motion was sustained and the order granted); and again upon our motion to transfer to the Summary Docket.

The action which it is sought to prohibit this respondent from trying is one wherein John J. Haines is plaintiff, and one Fred Swisher and this petitioner, The Ohio River Contract Company, are defendants. The Ohio River Contract Company is an Indiana corporation, with its main office at Evansville. It is now, and at all of the times affected in this litigation, was engaged solely in the execution of a contract entered into by and between it and the United States Government, whereby it was erecting and constructing a canal upon property acquired by the United States by purchase, with the consent of the Kentucky Legislature, and which territory will hereinafter be referred to as the Canal Reservation. The petitioner will be referred to as the Contract Company.

HISTORY OF THE LITIGATION.

On July 30, 1914, there was filed in the Jefferson Circuit Court by John J. Haines, a citizen of Kentucky, a petition ordinary, wherein the Contract Company and one Fred Swisher, a citizen of Kentucky, were named as defendants. The action was a damage suit for certain personal injuries alleged to have been sustained by Haines while employed by the Contract Company during its construction of the Government Canal. Summons issued July 31, 1914, upon said petition and on August 4,

1914, was served *within the Canal Reservation* upon one C. H. Wright, who was the superintendent of the Contract Company, and upon Swisher in his individual capacity.

Although it does not appear in the record and is not germane to this argument, it may be mentioned that the Contract Company thereupon removed the case to the United States District Court for the Western District of Kentucky, upon the ground of fraudulent joinder, from which court it was duly remanded.

Thereupon the Contract Company appeared in the Jefferson Circuit Court and filed its motion to quash the return upon the summons, and in support of that motion all parties filed numerous affidavits, which will be referred to later. While this motion was pending and on March 29, 1915, an alias summons was issued upon the petition and was served upon the same corporate agent, C. H. Wright, by delivering to him a copy *while he was at his home* on Bank Street in the city of Louisville. The motion to quash was overruled and the Contract Company then filed its special demurrer to the jurisdiction of the court. While said demurrer was pending in the trial court the Contract Company filed in the Court of Appeals of Kentucky a petition for a Writ of Prohibition. But when this state of facts developed and it was realized that the petition for the writ was premature, said petition was voluntarily dismissed without prejudice. Thereafter the special demurrer was overruled by the trial court and the Contract Company appeared and filed its answer in several paragraphs,

in the first paragraph of which it plead to the jurisdiction of the court and in subsequent paragraphs it denied the allegations of the plaintiff's petition and plead to the merits. To this pleading the plaintiff, Haines, filed his reply, in which he denied the material allegations of the first paragraph pleading to the jurisdiction, but *he subsequently withdrew that pleading and substituted therefor a general demurrer* to the first paragraph of the answer. This demurrer was sustained by the Jefferson Circuit Court and an order was entered deciding that the court had jurisdiction to hear and determine the cause of action set out in the plaintiff's petition and ordering that said cause be assigned for trial to March 27, 1916.

Thereupon the Contract Company filed its second petition in the Court of Appeals for a Writ of Prohibition asking for a temporary restraining order and for the Writ itself. The temporary restraining order was granted and the Petition for Prohibition was denied and dismissed upon a subsequent argument of the merits. From this judgment this Writ of Error was prosecuted. Our Motion for temporary restraining order and to transfer to the Summary Docket, both of which motions were granted by this court, have been referred to above.

THE AFFIDAVITS.

The affidavits appearing in the record were filed in the State trial court only in support of the motion to quash. As the final order of that court was entered in support of a general demurrer to that paragraph of the Contract Company's answer which plead facts in abatement of the court's jurisdiction, these affidavits really need not be considered. In our answer we plead those facts which we consider material to the jurisdiction, or lack of jurisdiction, of the court. The plaintiff could have admitted or denied those facts, or he could have plead other facts in avoidance. (Civil Code of Practice of Kentucky, Carroll's 1913 Ed., Sec. 95.) He chose to admit the allegations by demurrer. Having done so, he has admitted not only the truth of the facts alleged, but also that those were the *only* facts material to the issue. That is to say, for the purposes of the demurrer upon which the final order of the State trial court was entered, the allegations in the answer were taken as true and as stating every fact germane to the issue, and only the question of law arising out of those facts was presented to the court.

FACTS ALLEGED IN FIRST PARAGRAPH OF ANSWER OF CONTRACT COMPANY.

It is alleged:

That the defendant is a corporation of Indiana and a citizen and resident of that State, and of that State only, and is a non-resident of the State of Kentucky, and is not now doing, and never has done, any business therein. That the defendant at the time of the occurrences set forth in the plaintiff's petition and at the institution of that action and continuously since said dates, was, and has been, engaged in the performance of the contract entered into by it with the United States Government, as evidenced by a written instrument executed by its Secretary of War, and which contract calls for the erection and construction of a certain lock, dam and canal referred to in the petition of the plaintiff, Haines, and which is exclusively located and situated in a certain tract of land on the Ohio River near the city of Louisville, Ky., and *which was acquired by the United States of America by purchase or condemnation by and with the consent of the Legislature of Kentucky*, and over which territory the United States of America had and has exclusive jurisdiction and control. That each and every part of the work and labor performed by said defendant pursuant to said contract, and which is the only work or labor or contract performed by it in or near the Commonwealth of Kentucky, is executed and performed entirely and exclusively, save as hereinafter set forth, within and upon the aforesaid tract of land. That in the performance and

execution of each and every portion of said contract and of the work and labor incident thereto, said defendant is without discretion in the premises, but is arbitrarily bound, directed, regulated and controlled by the terms of the said contract with the United States of America as interpreted and enforced by its engineers and agents upon said tract of land and acting through its War Department. That the only work or labor now or at any time performed by said defendant outside of said tract of land, consist and consisted in dumping certain dirt and rocks dredged by it from within said tract of land upon certain land in the Commonwealth of Kentucky controlled by the Kentucky & Indiana Terminal Railway Company, and which said dumping is, and always has been, effected pursuant to written permission granted therefor by said Terminal Railway Company *to the United States of America*, and for which said dumping privilege no consideration of any kind or description passes, or ever has passed, to or from either said defendant or said Terminal Railway Company or the Government of the United States. That the accident and injury set out in the petition of the said Haines, and each and every individual and instrumentality, either directly or indirectly connected therewith, was each of them located within and upon said Government Reservation and not within or upon any territory controlled by the Commonwealth of Kentucky or the courts thereof. That the original summons issued upon said plaintiff's petition was served by the deputy sheriff of Jefferson County upon one C. H. Wright as the agent of this defendant while

said deputy sheriff and said Wright were each of them standing within and upon said Government Reservation, and not within or upon any territory controlled by the Commonwealth of Kentucky or the courts thereof. That the second or alias summons issued upon said petition was served upon the said Wright *while he was at his home* in Louisville, Ky., and *engaged in his private affairs, and not engaged in any business or agency of any kind whatever, for or on behalf of said defendant.*

ARGUMENT.

I. Jurisdiction Over the Person of the Contract Company Must Have Been Acquired by Service of Process or by Waiver.

The service of a summons in a case of this kind is governed by the Civil Code of Kentucky, Section 51, Subsection 6, which provides that service may be had upon the non-resident individual, partnership, association or joint stock company engaged in business in Kentucky by serving the person in charge of such business in Kentucky in the county where the business is carried on or in the county where the cause of action occurred. The statute reads as follows:

> "In actions against an individual residing in another State, or a partnership, association, or joint stock company, the members of which reside in another State, engaged in business in this State, the summons may be served on the manager, or agent of, or person in charge of, such business in this State, in the county where the business is carried on, or in the county where the cause of action occurred."

This language has been held to apply to non-resident corporations.

> International Harvester Co. v. Commonwealth, 147 Ky. 655, —— S. W. ——.

The Contract Company is a non-resident corporation doing business in Kentucky only to the extent that working within the United States Canal Reservation effects such a condition. As will be seen, the status acquired by this work is the crux of this entire litigation. As was succinctly stated by Mr. Justice Gray in Goldey v. Morning News, 156 U. S. 518:

> "It is an elementary principle of jurisprudence that a court of justice can not acquire jurisdiction over the person of one who has no residence within its territorial jurisdiction, except (1) by actual service of notice within the jurisdiction upon him; or (2) upon some one authorized to accept service in his behalf; or (3) by his waiver, by general appearance or otherwise, of the want of due service."

So this petitioner, being a corporation, was before the lower court, if at all, in one or both of only two ways, viz., by waiver of the want of service or by service on a duly authorized agent. The question of waiver will be considered first.

1-A. Jurisdiction Not Acquired by Waiver.

We would now briefly refer to decisions of the Court of Appeals of Kentucky approving the incorporation of a plea to the jurisdiction in an answer such as was filed by the Contract Company below. This course was expressly

approved in Louisville Home Telephone Co. v. Beeler's Admx., 125 Ky. 366. In that case an action was instituted in the Circuit Court against the Home Telephone Company and another, alleging that the telephone company was a common carrier operating in that county. The telephone company first filed a special demurrer and a separate plea to the jurisdiction, but before these were determined it filed its answer in three paragraphs, in the first paragraph of which it raised the question of the jurisdiction by alleging residence in Jefferson County and denying operation in Bullitt County, and in the subsequent paragraphs it plead to the merits. To this answer the plaintiff filed a reply and there was a separate trial of the jurisdictional question. The court finally decided in favor of this jurisdiction and the telephone company appealed. On appeal this court first considered whether or not the telephone company had entered its appearance by filing its answer both to the jurisdiction and to the merits, and after an extended review of the authorities, the opinion concluded (p. 376) that "a defendant may in one answer plead both to the jurisdiction and to the merits." The court reasoned that inasmuch as the Code of Practice has virtually abolished the common-law pleas in abatement by providing that defense to an action can only be made by a motion, demurrer or answer, and inasmuch as the proper defense in this case could not have been raised by demurrer because the petition stated facts sufficient to show jurisdiction, nor could the defense be made by motion to quash the return on the summons because it had been

properly served—"under the circumstances, therefore, the only kind of a defense that could be made by appellant, Louisville Home Telephone Company, was by answer" (p. 376). The court then pointed out that inasmuch as a defendant can only file one answer as a matter of right, all subsequent answers being amendments permissible only within the discretion of the court, the only remedy defendant had was to join all of its defenses in separate paragraphs of the same answer.

In Gainsboro Telephone Co. v. Buckner, 160 Ky. 604, 608-9, the procedure had in the Beeler case was approved in the following language:

> "Jurisdiction of the person, unlike that of the subject-matter, may be waived if the want of jurisdiction as to either is shown on the face of the petition or other pleading. The objection that the court is without jurisdiction may be made by filing a special demurrer to the pleading; but if the want of jurisdiction is not thus shown, the filing of the special demurrer will not raise the question. It must in such case be presented by the answer of the objecting defendant in the nature of a plea in abatement, or by motion to quash the summons and return."

The same procedure was also approved in the recent case of Barnes v. Union Central Life Ins. Co., 168 Ky. 253, where the insurance company had first moved to quash the return on the summons, then demurred specially to the jurisdiction of the court, and finally filed answer incorporating what at common law would be a plea in abatement of the jurisdiction.

This completes a consideration of every form of waiver of objection to the jurisdiction of the lower court,

which occurs to us. We will now proceed to a consideration of the actual service of process upon the agent of the Contract Company.

1-B. Jurisdiction Not Acquired by Service of Summons.

(1) The Original Summons.

There was served on the agent of the Contract Company both an original and an alias summons. The original summons was served while Wright was within the Canal Reservation; and so we shall consider the validity of that service as depending upon the status of that territory—which question will be considered at length later.

(2) The Alias Summons.

Each summons was served upon C. H. Wright as the agent of the company; but the alias summons was served upon him "while he was at his home in Louisville, Ky., and engaged in his private affairs and not engaged in any business or agency, of any kind whatever, for or on behalf of this defendant." (See Answer of Contract Co., Rec., p. 78, original, p. 33, print.)

It need not be argued that service upon an individual agent of a corporation does not bind a corporation unless the agent was served in his representative capacity; that is, unless the agent was served while in the performance of his agency. Mechanical Appliance Co. v. Castleman, 215 U. S. 441; Herndon-Carter Co. v. Norris, 224 U. S. 499; St. Louis R. R. Co. v. Alexander, 227 U. S. 226. As stated in International Harvester Co. v. Ky. (234 U. S. 583), "mere presence of an agent upon personal af-

fairs does not carry the corporation into the foreign State."

It is impossible to say that Mr. Wright was served in this manner. As we have shown above, the Contract Company has never done any business in Kentucky unless its performance of its contract with the United States constitute such. The execution of that contract calls for work upon the Government Reservation and is strictly limited to work therein, with the single exception of the dumping of debris upon the K. & I. property to be discussed later. Mr. Wright's relation to the Contract Company is that of an employe charged with the performance of that contract. His duties as such are limited to the corporate activity within the Government Reservation, as aforesaid. When he is at home he is there, not in his representative capacity as the agent or employe of the Contract Company, but in his private and individual capacity. The truth and reasonableness of this proposition is obvious. Suppose the Contract Company instead of working within the Reservation had been building a canal across the river at New Albany, Ind., and suppose that Mr. Wright for reasons of his own, had chosen to live with his family in Louisville, going to and from his work by the Kentucky & Indiana bridge. Could it, by any stretch of the imagination, be said that a summons from the Jefferson Circuit Court served upon Mr. Wright at his home in Louisville was binding upon the Ohio River Contract Company, a non-resident corporation doing no work in this State but erecting a canal over in Indiana? Precisely the same

reasoning applies to the suppositional facts and the actual facts, because, as we shall attempt to show later, the Canal Reservation within which the Contract Company was operating is foreign territory as far as the Kentucky courts are concerned. If summons from this court served upon an agent of the Contract Company while at his home in this city, is binding upon that company, it would also be binding if the company had been at work in another State instead of within the Canal Reservation.

> "The residence of an officer of a corporation does not necessarily give the corporation a domicil in the State. He must be there officially—there representing the corporation in its business. St. Clair v. Cox, 106 U. S. 350. In other words, a corporation must be doing business there. * * *" (Conley v. Mathieson Alkali Works, 190 U. S. 406, 411.)

(3) The Contract Company was Not Doing Business in Kentucky.

As we have pointed out the validity of the service of summons upon this plaintiff in error is governed by Sec. 51, Subsec. 6 of the Civil Code of Kentucky, set out at length above. The Harvester Co. case (147 Ky. 655, affirmed in 234 U. S. 579), is the last and most important decision construing this Code provision, and the decision turned upon the question whether or not the company was doing business in Kentucky when its agent was served there. Both the Court of Appeals of Kentucky and this court found, as a matter of fact, that the corporation was doing business in Kentucky and that, therefore, the service upon it was valid. Any other doctrine

would, of course, impair the due process clause of the Federal Constitution. As was written by Mr. Justice Day in the Harvester Co. opinion:

> "It has been frequently held by this court and it can no longer be doubted that it is essential to the rendition of a personal judgment that the corporation be 'doing business' in the State."

In St. Louis S. W. R'y Co. v. Alexander, 227 U. S. 218, it was said (p. 226):

> "A long line of decisions in this court has established that in order to render a corporation amenable to service of process in a foreign jurisdiction, it must appear that the corporation in transacting business in that district to such an extent as to subject it to the jurisdiction and laws thereof."

Again in Herndon-Carter Co. v. Norris Son & Co., 224 U. S. 496 (on appeal from the Western Dist. of Kentucky), it was said:

> "It has frequently been held in this court that a foreign corporation, in order to be subject to the jurisdiction of a court, must be doing business within the State of the court's jurisdiction, and service must there be made upon some duly authorized officer or agent."

But was the Contract Company doing business in Kentucky? This involves a consideration of two questions. First, was the Canal Reservation in which the company operated, an integral part of the Commonwealth of Kentucky; and, second, was the company doing any business outside of that territory? Discussion of the first question will be reserved until argument of the lower

court's jurisdiction over the subject-matter of the action.

In determining the second question it must be remembered that the allegations in the answer show that the Contract Company operated exclusively within the Canal Reservation, except that it dumped, upon land owned by the K. & I. Terminal R'y in Kentucky, certain debris dredged from within the Reservation. And it further appears that this dumping was performed pursuant to permission therefor given by the K. & I. to the U. S. Government. In other words, the Contract Company, who happened to be the government contractor, did not appear in the transaction at all, the permitter being the K. & I. Company and the permitee being the U. S. Government.

It is extremely difficult, if not impossible, to formulate a rule stating just what constitutes a doing of business within the technical meaning of that term. As stated by Mr. Justice Day in St. L. S. W. R'y v. Alexander, *supra* (p. 227):

> "This court has decided each case of this character upon the facts brought before it and has laid down no all-embracing rule by which it may be determined what constitutes a doing of business by a foreign corporation in such manner as to subject it to a given jurisdiction. In a general way it may be said that the business must be such in character and extent as to warrant the inference that the corporation has subjected itself to the jurisdiction and laws of the district in which it is served and in which it is bound to appear when a proper agent has been served with process."

In Commercial Mut. Accident Co. v. Davis, 213 U. S. 245, 256, the same judge wrote:

> "Previous cases in this court have not defined the extent of the business necessary to the presence of a foreign corporation in the State for the purpose of a valid service; it is sufficient if it is doing business therein."

The facts in the two cases quoted from are not helpful in the case at bar, for it was quite apparent in both cases that the defendant was doing business in the forum. In the Alexander case service was had upon an agent acting for two separate corporations, which were in fact the same corporation; and in the Davis case service was had upon an agent of an insurance company sent into the State by the company to adjust the claim involved in the instant case.

Green v. Chicago, Burlington & Quincy R'y Co., 205 U. S. 530, involved facts of interest to us in this case. There service was had upon an agent of the railway company, whose Eastern Terminal was Chicago, employed to solicit freight and passenger service in Philadelphia. For this purpose and "as incidental and collateral to that business" an office was hired for him in that city and he was designated as district freight and passenger agent, and advertised as such. It seems that he sold no tickets and received no money for payments for transportation of freight, but did sell to the public orders upon the Chicago office for tickets over the lines running west of that point. After considering the facts the court said:

> "Its (the service of process) validity depends upon whether the corporation was doing business in that district in such manner and to such an extent as

> to warrant the inference that through its agent it was present there,"

and then decided:

> "Without undertaking to formulate any general rule defining what transactions will constitute 'doing business' in the sense that liability to service is incurred, we think that this is not enough to bring the defendant within the district so that process can be served upon it."

And in the Harvester case, *supra* (234 U. S. 579), the court said, with reference to the Green case:

> "We have no desire to depart from that decision which, however, was an extreme case."

We have made a conscientious, and we believe, a thorough search of the Digests and have found no case which is of very material assistance in determining whether or not circumstances such as those disclosed in this record will constitute a doing of business by a non-resident corporation within the constitutional meaning of that term. We have, however, found a few authorities which bear indirectly upon the matter and we shall briefly refer to them.

In Haskins & Sells v. Kelly, 93 Pac. 605 (Kansas), a firm of accountants were employed to examine the books of the State Treasurer in Kansas, and it was held—that the firm was not doing business in that State within the meaning of the statute requiring foreign corporations to procure a permit to do so.

In Rich v. C., B. & Q. R'y Co., 74 Pac. 1008 (Washington), a damage suit had been brought against a non-resi-

dent corporation doing no business in the State, except that it maintained an agent there to advertise and solicit for business. Service of process on that agent was held invalid, the court saying:

> "It is not easy to formulate a general rule by which it can be determined in all cases whether or not a corporation is doing business at a particular place; but it seems to be the consensus of opinion that a corporation to be within the rule must transact within the State some substantial part of its ordinary business, continuous in the sense that it is distinguished from merely casual or occasional transactions, and it must be such a character that it will give rise to some form of legal obligation."

In Advance Lumber Co. v. Moore, 148 S. W. 212 (Tenn.), the non-resident corporation kept an account in a Memphis bank and maintained there an office with fixtures and office force for its purchasing agent maintained in that city. The corporation did no business in Tennessee except an occasional sale of lumber there. It also bought various mill machinery in Memphis and its letter heads advertised the existence of a Memphis office. It was held, however, that the company was not doing business in Tennessee within the statute respecting foreign corporations.

In Bradbury v. Mining Company, 113 Ill. App. 600, the foreign corporation did no mining or smelting in the State but it maintained an office there for the use of its secretary and treasurer, who, among other things, issued stock certificates and kept the corporate books. The directors of the company also held their meeting in that

office. Held: The company was not doing business in Illinois.

A similar decision was had in Penn. Collieries Co. v. McKeever, 87 N. Y. Supp. 869.

In Goepfert v. Compagnie Generale Transatlantique, 156 Fed. Rep. 196, maintenance by foreign corporations of a joint ticket office within the State was held—not doing business there.

In Mergenthaler Linotype Co. v. Hays, 168 S. W. 239 (Mo.), the installation by a foreign corporation of a single machine in defendant's Missouri office and the collection there of installments of the purchase price held—not to be doing business in Missouri.

In Thompson Manufacturing Co. v. Thede, 186 Ill. App. 248, the maintenance by an Ohio corporation of a warehouse in Illinois held—not to be doing business there.

In Kleine Bros. Co. v. German Union F. I. Co., 132 N. Y. Supp. 181, maintenance in New York by a foreign corporation of an office used by its president held—not doing business in New York.

In System Co. v. Advertising Cyc. Co., 121 N. Y. Supp. 611, maintenance by a foreign corporation of an office in New York with stenographers and solicitors employed to secure subscriptions to a magazine held—not doing business there, the court saying:

> "Such action is merely incidental to the business which the foreign corporation conducts in another State."

In Caledonian Coal Co. v. Baker, 196 U. S. 432, held —ownership of lands within the forum was insufficient to support service of summons there because that alone did not constitute doing business.

In Mexican Central R'y Co. v. Pinkney, 149 U. S. 194, maintenance by a foreign corporation of a railroad warehouse in Texas held—insufficient to validate service of process from the Texas courts on the company's agent there.

In Tyler Co. v. Ludlow-Saylor Wire Co., 236 U. S. 723, the foreign corporation maintained in New York an eastern representative on a salary and commissions and shared with another corporation office expenses. Held: The company was not doing business in New York.

Eirich v. Donnelly Contracting Co., 104 Fed. Rep. 1, presents facts more analogous to the facts at bar than do the authorities previously cited. There the plaintiff had sued the Contract Company for personal injuries received while in the company's employ and engaged in the building of a breakwater in the harbor at Cleveland, Ohio. Service was had upon the company's agent while within the forum "temporarily to look after the work being done on the breakwater." The contracting company was a New York corporation. It also appeared that the company's agent served was established in a room at the local hotel, but stated that he had temporarily located within the State only to supervise the work already begun and not for the purpose of securing new business. It was held that the service was insufficient because the defendant corporation was not doing business

in Ohio. We would call the court's attention to the fact that this company at the time of the service of summons was engaged in the performance of a contract quite similar to the contract involved in the instant case.

Evansville Courier Co. v. United Press, 29 Fed. 918, presents facts of even greater interest.

There service of Indiana summons was attempted upon a foreign newspaper corporation which had no office there but which leased certain telegraph wires from the Western Union Telegraph Company in Indiana for the transmission of news items to the company's home office. The summons was served upon the manager of the Western Union as the agent of the newspaper. The summons was also served upon the local representative of the newspaper in Indianapolis. Held: That the summons upon each individual was invalid because they were not the agents of the defendant and it was not doing business in Indiana.

We would call to the court's special attention the fact that this Newspaper Company controlled and operated a line of telegraph wires in Indiana but the court decided that this did not constitute doing business in that State. This circumstance is very nearly analogous to the circumstances which the plaintiff, Haines, below relied upon to justify the service of summons from the Jefferson Circuit Court, viz., the operation of a line of dump cars in the State.

In St. Louis Wire Mill Co. v. Consolidated Barbed Wire Co., 32 Fed. Rep. 802, it was held that the purchase

of raw material in Missouri by a Kansas corporation did not constitute doing business in Missouri.

And in United States v. American Bell Telephone Co., 29 Fed. Rep. 17, 35, it was said that:

> "It can not be held sufficient to give this court jurisdiction *in personam* over a foreign corporation that it has property rights, however, extensive, within the district, or that it has pecuniary interests, however, valuable, in business managed and conducted by others. It must itself be carrying on business in its own right. * * *"

In determining whether or not a corporation was doing business within the forum "there is no reason * * * to interpret the phrase * * * as if it was a term of an art or a mystery," as was stated by Judge Rose in the recent case of Frey & Son v. Cudahy Packing Co., 228 Fed. Rep. (Adv. Sheets), 209, 213. In determining whether or not a particular transaction constitutes doing business at a particular place, the transaction relied on should not be viewed as an isolated or a casual transaction, but should be considered in its relation to those other transactions which together make up the entire enterprise undertaken.

In International Text Book Co. v. Pigg, 217 U. S. 91, 104, it was decided that the Text Book Co. was doing business in Kansas because its transactions there "were not single or casual transactions, such as might be deemed incidental to its general business as a foreign corporation," thus indicating that a foreign corporation might perform single or casual transactions as incidental to its

general business and not thereby render itself subject to process of the forum.

See also the language of the Circuit Court of Appeals of the Third Circuit in Bellefield Co. v. Calton Investment Co., 228 Fed. Rep. (Adv. Sheets), 621, 624:

> "Such acts as the plaintiff did within the State were temporary and incidental in character; they can in no fair sense be regarded as a doing of business by it in the State. * * *"

That decision was based upon facts in no way analogous to the facts at bar, but the quotation is offered to show the attitude of the judicial mind toward operations which seem to be merely incidental to the general business of the corporation considered.

In the instant case the Contract Company was engaged in the execution of a large contract. It involved the employment of hundreds of men and hundreds of thousands of dollars worth of machinery and material. It involved the blasting of rock, dredging of the river bottom, the shoveling of great masses of earth, the preparation of concrete, the erection of great scaffoldings and moulds and the omnipresent surveillance of the army of men employed to do all those things. The purpose for which the Contract Company left its native State of Indiana was to do all of those things—to build that lock, dam and canal for the United States Government under the guidance of the United States Army Engineers. *That* was the business it was doing in Kentucky, if it did any business in this State.

But in the execution of that contract it was foreseen by the United States Army Engineer who drew up the specifications and before he even accepted bids for the work contemplated, that it would be expedient for the contractor who should eventually be awarded the contract to be able to dump some part of the debris dredged from the new canal bed upon the contiguous property of the K. & I. Bridge Company. Therefore, the United States Army Engineer secured permission from the K. & I. *on behalf of the United States Government* for its contractor—at that time not even selected—to dump upon K. & I property certain debris. And when (after the Contract Company was awarded the contract) it proceeds to exercise that privilege secured for it by the United States Government, it is now contended that such dumping constitutes a doing of business in Kentucky to such an extent that it renders the company subject to a personal action in Kentucky courts. When the extent of the "business" done in Kentucky is considered in relation to the work done within the United States Canal Reservation (which we contend is foreign territory) we most earnestly contend that the operations in Kentucky do not constitute a doing of business here within the constitutional meaning of the term. By analogy it might as well be said that a man is physically present in Kentucky who stands just beyond the State line but with his coat tails blowing over into the State!

In determining this question we ask the court to recall that the early doctrine was that an action *in personam* would never lie against a corporation existing

under the laws of a foreign State. (Thompson on Corporations, Sec. 7997.)

The phrase "doing business" means doing some substantial part of the business for which the corporation was organized. It means more than the mere linguistic signification of the words themselves—it means that the company has become domesticated in the forum because of its activities there.

We will close this discussion with an excerpt from the opinion of the United States Circuit Court of Appeals for the Ninth Circuit in Doe v. Springfield Boiler Co., 105 Fed. Rep. 684, 687 (italics ours):

> "The question as to what kind of business by a foreign corporation within a State will justify a finding that it is engaged in business therein and validate a service upon its agent, has been very thoroughly and elaborately discussed in the Circuit and Supreme Courts of the United States and the general consensus of opinion is that the corporation must transact within the State *some substantial part of its ordinary business* by its officers or agents appointed and selected for that purpose and that the transaction of an isolated business act is not the carrying on or doing business in a State."

(4) The Legal Status of the Canal Reservation.

We shall now discuss the status of the tract of land we have referred to as the "Canal Reservation." This question is really the turning point of the case. If the land is Federal territory in the sense that it is foreign to the State of Kentucky and the courts thereof, then the service of the original summons was void and the Contract

Company was doing no business in Kentucky, except to the extent of the dumping of debris on Kentucky territory heretofore referred to.

The answer of the Contract Company (Rec., original 78, print 31) alleges that the cause of action shows, and the original summons was served within the United States Canal Reservation, "a certain tract of land on the Ohio River lying near the city of Louisville, Ky., and acquired by the United States of America by purchase or condemnation by and with the consent of the Legislature of Kentucky." It is our contention that said tract of land constitutes Federal territory precisely to the same extent that the District of Columbia does, and that the Commonwealth of Kentucky and the courts thereof have absolutely no jurisdiction over it, or any cause of action arising within it.

The Constitution of the United States, Art. 1, Sec. 8, Clause 17, provides that the Congress shall have power---

> "To exercise exclusive legislation, in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular States, and the acceptance of Congress, become the seat of the government of the United States; and to exercise like authority over all places purchased by the consent of the Legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings."

In *U. S.* v. *Tucker*, 122 Fed. Rep. 518, the issue presented was the sufficiency of a criminal indictment against Tucker for an offense committed upon the U. S. Canal Reservation on Green River, known as Lock No. 3. The

defendant filed a general demurrer. The U. S. District Court for the Western District of Kentucky held, first that Art. 1, Sec. 8, Clause 17 of the U. S. Const., applies to land acquired for canal purposes, and second, either a purchase by the U. S. with the consent of the State, or a cession of jurisdiction by the State suffices to give criminal jurisdiction over the land to the U. S. provided the land is actually owned by it and used for government purposes. The case was decided in 1903, and it does not appear to have been cited except in the two cases immediately following. The opinion also distinguishes the decision in R. R. Company against Lowe, 114 U. S. 525, perhaps the leading authority on this question of jurisdiction, by pointing out that title to the land in question there was acquired by the U. S. *not* by virtue of any State action, but by virtue of a treaty with a foreign nation. The Tucker case is undoubted authority for the proposition that so far as criminal offences are concerned, the Federal courts and not State courts have jurisdiction over a Canal Reservation.

In U. S. v. Andem, 158 Fed. 996, a decision by the District Court in N. J., the issue was also presented by demurrer to a criminal indictment for an offence committed within the U. S. Custom House at Trenton, N. J. It was there decided that the U. S. had jurisdiction, both of the person and of the crime committed, notwithstanding a reservation in the State cession of jurisdiction to the Fed. Government, of the right to serve process within the territory. Judge Evans' decision in the Tucker case was cited as authority for the proposition that the U. S. has

complete jurisdiction over territory acquired by purchase with the consent of the State.

Steele v. Halligan, 229 Fed. Rep. 1011. This was an action for damages brought by a Federal convict against the warden of a Federal penitentiary. The case was removed to the United States District Court for the Western District of Washington, and on motion to remand the Federal jurisdiction was upheld and the case retained. The cause of action alleged was negligence on the part of the warden in failing to provide the plaintiff with a safe place in which to work, and which resulted in his injury. The petition for removal alleged that the accident occurred within the United States penitentiary "and on land and property used exclusively for a United States penitentiary and exclusively within the jurisdiction of the United States and of the United States courts." The decision of the court was based upon the fact that the suit was one arising under the laws of the United States, because the defendant in performing the acts complained of was actually discharging a duty imposed upon him by Federal statute. In answer to the contention that the controlling law was not the Federal statute but simply the general law of negligence, it was stated that the law of negligence in force in the State prior to the acquisition of the territory by the Federal Government becomes by virtue of that acquisition the Federal law. The opinion is very interesting because of its reference to the Tucker case, the Ft. Leavenworth case, the McGlinn case, and others.

In Fort Leavenworth R. R. Co. v. Lowe, 114 U. S. 525, above referred to, it was said that when the United States acquires lands within the limits of a State by purchase with the consent of the Legislature of the State for any of the purposes set out in Article 1, Sec. 8, Clause 17 of the Const., exclusive jurisdiction is conferred thereby upon the Federal Government. (W. U. v. Chiles, 214 U. S. 274, to same effect.) And it was decided that the State of Kansas had authority to tax the railroad property within the Fort Leavenworth Military Reservation because of the fact commented on by Judge Evans in the Tucker case, viz., that the United States owed its title to the territory by virtue of a treaty with France. See pages 532 and 539 of the opinion. See, also, Palmer v. Barrett, 162 U. S. 399.

We shall now refer to those few decisions we have been able to find from other State courts which deal with this somewhat unusual question.

State v. Mack, 47 Pac. Rep. 763 (Nevada, 1897), also presented a criminal indictment for a crime committed within Federal territory, viz., the U. S. Post Office. The defendant filed a plea to the jurisdiction to which a demurrer was sustained by the court. It was admitted that the crime was committed on land purchased by the U. S. with the consent of the State. An Act of the Nevada Legislature had ceded jurisdiction to the United States "For all purposes except the administration of the criminal laws of this State and the service of any civil process therein and thereon." On appeal the judgment was reversed. The court remarked that if the land was pur-

chased by the United States for any of the purposes set out in Art. 1, Sec. 8, Clause 17 of the Fed. Const., the reservation of any jurisdiction by the State was void; that the reserved jurisdiction in the Nevada Act was simply intended to provide for the service of criminal process within the territory concerning crimes committed on Nevada land. It was pointed out that to hold that the reservation ousted Federal jurisdiction of crimes committed on the Federal lands would destroy the very purpose of the Nevada Act—because the United States could, without any State Act, acquire land in Nevada and hold it like any private proprietor, *i. e.*, subject to the jurisdiction of Nevada courts. The very fact that the Legislature saw fit to pass the act ceding jurisdiction, must show an intention to change the status of the U. S. from that of an ordinary proprietor; and no such change of status is effected unless it is held that the U. S. has exclusive jurisdiction of crimes committed within its territory. We would point out here that the same decision must have been reached, had this case presented a tort action rather than a criminal indictment. In fact, the reasoning of the opinion would apply more clearly to torts than to crimes, because the Nevada Act, while reserving the entire "administration of the Criminal Laws," merely reserves the right to *serve Civil Process* within the territory.

In Mitchell v. Tibbitts, 34 Mass. 298, it was held that a ship delivering stone to the Boston Navy Yard did not fall within the Mass. statute relating to ships transporting stone "within this Commonwealth," because the land for

the Navy Yard had been purchased by the U. S. with the consent of the State (although reserving concurrent jurisdiction for service of process therein).

Schmit v. Day, 39 Pac. Rep. 870 (Oregon, 1895), is authority for the proposition that process over a State Court will not run into Federal territory.

Foley v. Shriver, 81 Va. 568. This was an attachment suit against a non-resident of Virginia and the Soldiers Home, a corporation occupying land purchased by the U. S. with the consent of Virginia. The lower court denied the attachment because the Soldiers Home was a non-resident corporation and not within the jurisdiction of the court. On appeal, this judgment was affirmed, the court saying: "From the foregoing cases it is seen that no other legislative power than that of Congress can be exercised over lands within a State purchased by the U. S. with the consent of the State for one of the purposes designated (*i. e.*, in U. S. Const.) and that such consent under the Constitution operates to exclude all other legislative authority. *If the U. S. has the right of the exclusive legislation over the ceded lands, they also have the exclusive jurisdiction. The right to exclusive legislation gives exclusive jurisdiction.*. (Authorities cited.) In this case the State Legislature having given the required consent and the U. S. having purchased the land in question, the U. S. have acquired under the Federal Constitution exclusive jurisdiction over the ceded lands and *they are no longer a part of the State of Virginia* and are not subject to the jurisdiction of the State courts."

Dibble v. Clapp, 31 Howard Practice, 420, is also authority for the proposition that the right of exclusive legislation gives exclusive jurisdiction.

Sinks v. Reese, 19 Ohio St. Reps. 306, is to the same effect as Foley v. Shriver, *supra.*

Bank of Phoebus v. Byrum, 110 Va. 708, was a suit arising out of Probate proceedings involving the sale of the Hygeia Hotel located on the Fortress Monroe Reservation. It was held that the Federal Court had jurisdiction of the proceedings because the location of the property and of the persons within the Reservation, necessarily raised Federal questions not cognizable in a State Court.

In Crook v. Old Point Comfort Hotel Company, 54 Fed. Rep. 604, the U. S. Circuit Court for the Eastern District of Va. had before it the question of jurisdiction over the Chamberlain Hotel standing within the Old Point Comfort Government Reservation. The issue was raised on exceptions filed to the Masters' Report in Chancery proceedings to marshal assets of the defunct hotel company. It appeared that the Virigina Act ceding the land comprising the Reservation to the U. S. contained a clause providing for reversion to the State, should the U. S. appropriate the land to a use other than for the National defense. Title to the land passed to the U. S. by virtue of this act alone *and not by purchase.* It was pointed out (as in Railroad v. Lowe, *supra*), that land acquired by the U. S. in any other manner than by purchase with the consent of the State, or by cession of jurisdiction by the State was not governed by Art. 1,

Sec. 8, Clause 17 of the U. S. Const., giving the Federal Government exclusive jurisdiction, but the U. S. holds the land as would any other person and subject to the terms of the grant. The Fortress Monroe Reservation being held by the U. S. not by virtue of the U. S. Constitution, but by tenure prescribed in the Virginia Act, the land on which the U. S. had seen fit to permit the erection of a hotel, *ipso facto* reverted to the State because of the abandonment of the original use for military purposes. Held, that the land not having been acquired by purchase and Art. 1, Sec. 8, Clause 17 not applying, the United States had not exclusive jurisdiction thereof, but Virginia had concurrent jurisdiction in all cases where its exercise would not operate against the military use of the land, the purpose for which it had originally been ceded by the State. The decision in Foley v. Shriver, *supra*, was distinguished, as that decision involved land acquired by purchase, and Art. 1, Sec. 8, Clause 17 applied.

In Harkness v. Hyde, 98 U. S. 476, the U. S. Supreme Court decided that a summons from an Idaho Court which was served on the defendant at his residence "which was on the Indian Reservation known as Shoshonee Reservation" was illegal and invalid, it appearing that the reservation was a separate entity from the territory of Idaho. Strange to say, this case does not appear to have been cited in any subsequent Federal opinion upon this precise point; although it has been cited some fifty times upon another point decided therein.

The opinion by Judge Lacombe in Beekman v. Railroad Company, 35 Fed Rep., p. 1, is well considered and instructive upon this general question of jurisdiction; although the decision there is not directly in point.

In Story on the Constitution, Vol. 3, p. 103, Sec. 1222, after rehearsing the history of Art. 1, Sec. 8, Clause 17, the learned author concludes:

> "It follows from this review of the clause that the States can not take cognizance of any acts done in the ceded places after the cession" (of land to the U. S.).

In the lower court counsel urged against us the case of Madden v. Arnold, 57 N. E. 1116, affirming 47 N. Y. Supp. 757. That action was for dog bite sustained on a United States military reservation. The land had been purchased by the United States "and over which the Legislature of the State of New York had ceded jurisdiction * * * for the purpose of erecting and maintaining thereon an arsenal * * * reserving to the State concurrent jurisdiction with the United States so far as that" civil and criminal process might be served therein. It appears in the opinion that the land was acquired by the United States without the consent of the State (wherein consider Art. 1, Section 8, Clause 17 of the U. S. Constitution), but the State had by special act ceded jurisdiction therein to the United States with the reservation above referred to. Held—that plaintiff's cause of action was within the jurisdiction of the New York courts.

Hoffman v. Leavenworth Light Co., 138 Pac. 632, was also cited by counsel for Haines in the lower court. That

was a Kansas decision in an action for personal injuries received from certain electric light wires located on the Ft. Leavenworth Reservation. Judgment for plaintiff in the lower court was reversed because defendant had no notice of the defect responsible for the injury. The defense that the State Court had no jurisdiction over the cause of action was denied, because the territory had not been acquired by the United States by purchase with the consent of the State, but rather by a treaty with France before the admission of Kansas into the Union. The decision was based upon Railroad Co. v. Lowe, referred to above.

Both of these cases are distinguished from the instant case, because in each of them the territory had been acquired *other than by purchase with the consent of the State*. And under the allegations of the Answer of the Contract Company, as admitted by plaintiff's demurrer, this fact obtains.

This general question of jurisdiction over territory ceded to the Federal Government by the various States has been considered in the opinions of several of the Attorney Generals and reported in the following volumes of the printed opinions of those law officers:

Vol. 13, p. 461, states that the United States acquires jurisdiction over territory within the State (1) by purchase with the consent of the State; or (2) direct cession of jurisdiction over the territory by the State.

In Vol. 20, p. 611, Attorney General Olney advised that a Wisconsin statute of cession which reserved to the State the right to serve its process within ceded terri-

tory and also reserved jurisdiction of the State courts to try offences committed therein, was invalid under R. S., Sec. 355, requiring consent of the Legislature of the State in which the ceded land is situated to its purchase by the United States.

Vol. 21, p. 18, states that the mechanics' lien laws of a State do not apply to government contractors working on a government reservation.

In Vol. 24, p. 617, Attorney General Knox discusses the kind of consent by the State to the acquisition of the land by the United States required by R. S., Sec. 355, and concludes:

> "It seems that a reservation by the State of anything like concurrent jurisdiction over the territory invalidates the consent which must be absolute so far as jurisdiction is concerned, as advised by Attorney General Olney in Vol. 20, p. 611, and Vol. 20, pp. 242 and 298; each opinion holding that a grant of exclusive legislation and concurrent jurisdiction over the territory acquired by the United States is invalid."

Vol. 21, p. 455, states that the United States in its sovereign capacity may acquire and hold real estate needed for any of its sovereign uses by any means by which a private individual could do so.

II. Prohibition Only Adequate Remedy.

In Kentucky an appeal is an entry of appearance and the successful appellant is before the trial court upon a remand of the case. See Southern Coal & Coke Co. v.

Bowling Green Coal Co., 161 Ky. 477—wherein consider Western Indemnity Co. v. Rupp, 235 U. S. 261. Wherefore, if the Haines case goes to trial and judgment is rendered for the plaintiff and the defendant appeals and the Appellate Court reverses the case because the trial court lacked jurisdiction, yet by virtue of the very process whereby the lack of jurisdiction was established that same jurisdiction attaches and is made sufficient and at the new trial the defendant is before the court. To say, as the Court of Appeals of Kentucky has said, that an appeal under such circumstances is an adequate remedy for this Plaintiff in Error and a justification for the denial of the Writ of Prohibition is, we say with all respect, a travesty on justice.

SUMMARY.

From the above authorities these principles may be deduced:

First: Art. 1, Sec. 8, Clause 17, of the U. S. Constitution providing that the Federal Government shall have exclusive legislation over lands ceded to it by any State for the erection of forts, magazines, arsenals, dock yards and other needful buildings includes territory ceded for canal purposes.

Second: Territory acquired by the United States for any of the purposes covered by this section of the Constitution is held under the direct authority of the Constitution and exclusive of State action.

Third: The vesting in the United States of exclusive legislation over such territory necessarily includes exclusive jurisdiction thereover.

Fourth: The Federal Government may acquire complete jurisdiction over territory within the State in either one or both of two ways: (a) By purchase with the consent of the State; or (b) by a voluntary cession by the State of its authority over the land.

Fifth: Concurrent jurisdiction in the State is both illegal and illogical. The United States can hold territory within a State in the absence of a specific State grant just as any private proprietor could do so, and to maintain that a State retains concurrent jurisdiction over the territory when it has specifically consented to its acquisition by the United States, is to render that specific consent a nullity. The status of the United States as proprietor must be different when there is a specific grant by the State and when there is no such grant.

Sixth: The criminal jurisdiction of the United States over such territory is universally accepted and the same reasoning applies to torts as to crimes committed in the territory.

Seventh: There are several well-considered opinions vesting jurisdiction in the Federal courts over private causes of action originating in territory ceded by the State to the Federal Government.

CONCLUSION.

We have attempted to show by this argument the following things:

The lower court lacked jurisdiction over the person of the Contract Company because the service of the original summons was invalid, because it was had within the United States Reservation; and the service of the alias summons was also invalid because it was had upon an individual who did not then represent his corporation, which was doing no business in Kentucky.

The lower court lacked jurisdiction over the subject-matter, because the cause of action arose within the Canal Reservation, which is Federal territory.

And there has been no waiver of the Contract Company's right to object to this lack of jurisdiction.

If we have proved the lack of jurisdiction of the Jefferson Circuit Court over the person of the defendant, Contract Company, or over the subject-matter of the Haines action, we have shown our right to the writ petitioned for in the Court of Appeals of Kentucky.

We ask that the judgment of the Court of Appeals of Kentucky be reversed and that the court be directed to issue the writ of prohibition petitioned for by plaintiff in error.

Respectfully submitted,

A. E. Richards,

W. Overton Harris,

Counsel for Petitioner.

Office Supreme Court, U. S.
FILED
APR 13 1917
JAMES D. MAHER
CLERK

IN THE

Supreme Court of the United States

THE OHIO RIVER CONTRACT COMPANY, *Plaintiff in Error,*

vs.

HONORABLE THOS. R. GORDON, *Judge, Defendant in Error.*

APPENDIX TO BRIEF FOR PLAINTIFF IN ERROR.

The following is the Kentucky statute pursuant to which the statement referred to on page 13 of the Record and pages 6-7 of opposing counsel's brief, was filed:

Kentucky Statutes, Section 571:

> "All corporations except foreign insurance companies formed under the laws of this or any other state and carrying on any business in this state shall at all times have one or more known places of business in this state and an authorized agent or agents thereat upon whom process can be served; and it shall not be lawful

for any corporation to carry on any business in this state until it shall have filed in the office of the Secretary of State a statement filed by its president or secretary giving the location of its office or offices in this state and the name or names of its agent or agents thereat upon whom process can be served; and when any change is made in its office or offices or in its agent or agents it shall at once file with the Secretary of State a statement of such change; and the former agent shall remain agent for the purpose of service until statement of the appointment of the new agent is filed; and if any corporation fails to comply with the requirements of this section such corporation and any agent or employee of such corporation who shall transact, carry on, or conduct any business in this state for it shall be severally guilty of a misdemeanor and fined not less than one hundred nor more than one thousand dollars for each offense."

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SUPREME COURT OF THE UNITED STATES

OHIO RIVER CONTRACT COMPANY,
Plaintiff in Error,

versus

HONORABLE THOMAS R. GORDON,
Judge of the Jefferson Circuit Court,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

MATTHEW O'DOHERTY,
Counsel for Defendant in Error.

MATTHEW O'DOHERTY,
MORTON K. YONTS,
Counsel for Defendant in Error.

January 24, 1917.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

IV.

Contention of plaintiff in error is based on an erroneous construction of Subsection 17, Section 8, Article 1, of Constitution of United States. (Brief, pp. 7, 8.)

Subsec. 17 of Sec. 8, Art. 1, Constitution of U. S.
Fort Leavenworth Railroad Co. v. Lowe, 214 U. S. Rep. 525.

V.

The temporary restraining order was not revived by the supersedeas. (Brief, pp. 11, 12, 13, 14, 15, 16, 17, 18, 19.)

Runyon v. Bennett, 4 Dana, 599.
Gardner v. Continental Ins. Co., 31 Ky. L. R. 69.
May v. Commonwealth, 160 Ky. 985.
National Bank v. Dutcher, 128 Iowa, 413.
State, *ex rel.*, Busch v. Dillon, 96 Mo. 56.
Gardner v. Gardner, 87 N. Y. 18.
Genet v. Delaware & H. Canal Co., 113 N. Y. 475.
Hawkins v. State, 126 Ind. 296, 26 N. E. 43.
Sixth Ave. R. Co. v. Gilbert Elev. R. Co., 71 N. Y. 430.
James v. Markham, 125 N. C. 145, 34 S. E. 241.
Bullion, C. & C. Min. Co. v. Eureka Hill Min. Co., 5 Utah, 151, 13 Pac. 174.
State, *ex rel.*, Gibson v. Superior Court, 1 L. R. A. (N. S.) 554.
Ohio River Contract Co. v. Gordon, 172 Ky. 407.
Sec. 1007, R. S. Comp. St. 1901.
Kitchen v. Randolph, 93 U. S. 86, 23 Law Ed. 810.
Sage v. Cent. R. R. Co., 93 U. S. 412, 22 Law Ed. 933.
Sec. 2063, p. 515, Montgomery's Manual of Fed. Procedure.

VI.

Plaintiff in error confuses the admiralty jurisdiction of United States courts with their general jurisdiction. (Brief, pp. 19, 20, 21, 22, 23.)

Sec. 2, Art. 3, United States Constitution.
Cooley's Const. Lim., 2d Ed., p. 155; 1st Cyc., p. 816, col. 1.
Price v. Bell of the Coast, 66 Fed. 62.
The Mary Garrett, 63 Fed. 1009.
Johnson v. Chicago & Pacific Elevator Co., 119 U. S. 388.
Fort Leavenworth R. R. Co. v. Lowe, 214 U. S. Rep. 525.

VII.

The writ of prohibtion can not be invoked where the error, if any, can be corrected on appeal. (Brief, pp. 24, 25, 26.)

Ohio River Con. Co. v. Gordon, 170 Ky. 412.
Bank Lick Turnpike Co. v. Phelps, 81 Ky. 613.
Hughes v. Holbrook, 32 Rep. 1210.
Thomas v. Davis, 110 S. W. 408.
Com. v. Weissinger, 143 Ky. 368.
White v. Kirby, Judge, 147 Ky. 497.

VIII.

Haines has the right to have his case against the Contract Company heard somewhere. (Brief, pp. 26, 27.)

SUPREME COURT OF THE UNITED STATES

OHIO RIVER CONTRACT COMPANY, - *Plaintiff in Error,*

versus

HONORABLE THOMAS R. GORDON, JUDGE OF THE JEFFERSON CIRCUIT COURT, - *Defendant in Error.*

BRIEF FOR DEFENDANT IN ERROR.

May it please the Court:

This case comes before the court on the motion of the defendant in error to affirm the judgment of the Court of Appeals of Kentucky, denying the Writ of Prohibition against the defendant in error, on the ground that it is manifest that the Writ of Error was taken for delay only, and that the questions on which the decision of the cause depends are so frivolous as not to need further argument; and on the motion of the plaintiff in error for one of four different orders:

(1) For an order, restraining the defendant from proceeding with the trial of the case pending before him, named in the notice;

(2) For a rule against the defendant in error, to show cause why a restraining order against him should not be issued;

(3) For a rule against the defendant in error to show cause why he is proceeding with the trial of the case named;

(4) For a rule against defendant in error to show cause why he should not be adjudged in contempt "of said order of supersedeas."

What order of supersedeas is referred to we can not gather from the notice, but presume it is the order of supersedeas made when the writ of error was allowed herein to the Court of Appeals of Kentucky to review the judgment refusing to grant a writ of prohibition against the defendant in error, and dismissing the petition therefor of the plaintiff in error. (See Trans., p. 44.)

THE STATE COURT HAS JURISDICTION OF THE SUBJECT OF THE ACTION.

The action of John J. Haines v. Ohio River Contract Company, referred to in the notice and in the petition for writ of prohibition, is an action on the case for personal injury. Such an action is not local but transitory and may be prosecuted in any court of competent jurisdiction, wherever the defendant may be found.

Stone v. *U. S.*, 167 U. S. 176.

The contention made in the State Court and which may be repeated here that the rule is different, because Haines' cause of action against the plaintiff in error arose upon a strip of land in Kentucky, acquired by the United States, for the purpose of widening the Louisville and Portland Canal, has no semblance of merit. The cause

of action being transitory, it is immaterial whether the United States has or has not exclusive legislative jurisdiction over the strip of land where the cause of action arose.

Chicago R'y Co. v. *McGlinn,* 114 U. S. 542.
Dennick v. *N. J. Cent. R. Co.,* 103 U. S. 11.
Lou. R'y Co. v. *Whitlow,* 19 Ky. L. R. 1931, 41 L. R. A. 614.
Austin's Admr. v. *P., C., C. & St. L. R'y Co.,* 122 Ky. 304.

STATE COURT HAS JURISDICTION OVER PERSON OF PLAINTIFF IN ERROR.

The State court acquired jurisdiction over the person of the plaintiff in error;

(1) By the service of process upon the agent named by the plaintiff in error for such purpose in the statement lodged by it in the office of the Secretary of State of Kentucky, as required by Section 571, Kentucky Statutes. The plaintiff in error, a corporation, organized under the law of Indiana, was required by the Statute, before doing business in Kentucky, to file a statement in the office of the Secretary of State of Kentucky, "giving the location of its office or offices in this State, and the name or names of its agent or agents thereat, upon whom process may be served."

The plaintiff in error complied with this statute about four months before the institution by Haines of his action against it in the State court, by filing in the office of the Secretary of State of Kentucky its state-

ment, duly executed, naming its place of business in Kentucky as "Lock No. 41, 31st and the River Government Reservation, Louisville, Ky., and Clarence H. Wright, of Louisville, Ky., as our agent thereat, upon whom process may be served in any suit that may be brought against our company within the State of Kentucky." (See Trans., p. 13.)

The process, which issued on the petitions, was duly executed by the Sheriff of Jefferson County, on Charles H. Wright, the agent named, August 4, 1914. (See Trans., p. 11.)

The plaintiff in error made a motion in the Circuit Court to quash the officer's return on the summons and filed the affidavit of C. H. Wright, to the effect that the "aforesaid summons was served upon him August 4, 1914, at about 1 p. m.; that at said time he was, to the *best of his recollection* within the aforesaid land or territory, exclusively owned and controlled by the United States Government." (Trans., p. 11.)

Thereupon and before the motion to quash the return on the summons was heard, the plaintiff, Haines, caused an alias summons to issue against the defendant, the Ohio River Contract Company, which was duly executed by the Sheriff of Jefferson County, by delivering a copy thereof to Wright on March 29, 1915, in the city of Louisville, and outside the alleged government reservation. (Trans., p. 18.)

The plaintiff in error also moved the court to quash the return on the alias summons. The motion to quash the return on the original and alias summons was heard

and overruled by the court August 2, 1915. (See opinion of court and order, Trans., pp. 29-30.)

Thereafter, on November 12, 1915, the plaintiff in error filed its answer in the case. (See Trans., pp. 31, 32). By the first paragraph of its answer it attempted to have retried the same identical question, which it had raised and which had been heard and determined against it on its motion to quash the Sheriff's return on the original and alias summons.

The court refused to retry the issue and sustained a demurrer to the first paragraph of the answer, on the ground, among others, that the court had already passed upon the question and no motion had been made to set aside the order, overruling the motion to quash the return on the original and alias summons.

No Bill of Exceptions was taken or filed to the action of the court in overruling the motion to quash the Sheriff's return on the summons and without such Bill of Exceptions the court can not know what evidence was heard on the hearing of that motion. A number of affidavits appear to have been filed and may have been read on the hearing, but whether they were read, and, if so, what other evidence, if any, was presented or heard, does not and, without a Bill of Exceptions, can not appear in the record. It is at least possible that Mr. Wright's "best recollection" of just where he stood, when the summons was executed upon him, may have been refreshed by the affidavit of Duddy, the deputy sheriff. (See Trans., p. 19.) But, that he, Wright, was in Jef-

ferson County, Ky., and outside the limits of the strip of land claimed by the United States government, when the alias summons was served, is not questioned.

The facts, as above recited, are, we think, all that need be brought to the court's attention on this hearing.

As to the jurisdiction of the Jefferson Circuit Court over the person of the plaintiff in error, we think it only necessary to say,

(1) That the answer, filed by the plaintiff in error, shows that it was engaged in doing business in Kentucky, when the summons was served upon it. We quote from paragraph 1:

> "Defendant states * * * that the only work or labor now or at any time performed by this defendant outside of or beyond said government reservation consists in dumping certain dirt rock and other debris * * * upon certain land in the State of Kentucky, etc."

Of course, the extent of the business conducted by the plaintiff in error is not material. The dirt and rocks were loaded on railroad cars and run over a track on to the land of the Kentucky and Indiana Terminal R'y Company and dumped in Kentucky. (a)

(2) The plaintiff in error, having by its writing expressly named Wright as its agent for the service of process in all suits, that might be brought against it in Kentucky, and having named Lock 41, 31st and River, Government Reservation, Louisville, Ky., as the place of business in Kentucky, is estopped to question the validity

(a) Trans. p. 23.

of the service of process upon its named agent at its named place of business in Kentucky.

Old Wayne Mut. Life Ins. Assn. v. *McDonough*, 204 U. S. 8.

Even, if the service of process upon it could not have been validly made on the Government Reservation—so called—this was a personal privilege, which it could waive and did waive by filling the statement in the office of the Secretary of State of Kentucky, in virtue of which it was enabled to conduct whatever business it did conduct in Kentucky. Without complying with the statute, it would have been subject to a heavy fine and no contract made by it in Kentucky could be enforced.

Fruin-Colnon Contracting Co. v. *Chatterson*, 146 Ky. 504.

CONTENTION OF PLAINTIFF IN ERROR IS BASED ON AN ERRONEOUS CONSTRUCTION OF SUBSECTION 17, SECTION 8, ARTICLE 1 OF CONSTITUTION OF UNITED STATES.

The contention for plaintiff in error is based on a misapprehension of Subsection 17 of Section 8 of Article 1 of the Constitution of the United States, which Subsection reads as follows:

> "That Congress shall have power * * * to exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular States, and the acceptance of Congress, become the seat of the Government of the United States, and to exercise like au-

thority over all places purchased by the consent of the Legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards and other needful buildings; and

"To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof."

The subsection quoted confers exclusive legislative power upon the United States over—

First: The District of Columbia.

Second: Over land acquired by the United States, with the consent of the Legislature of the State "*for the erection of forts, magazines, arsenals, dock-yards and other needful buildings.*"

It is not and could not have been truthfully alleged in the petition in this case that the strip of land, alleged to be owned by the United States Government, and upon which it is alleged the cause of action in plaintiff's petition stated originated, was purchased by the United States Government for any of the specific purposes enumerated in the constitutional provision quoted.

In the case of *Fort Leavenworth Railroad Co.* v. *Lowe*, 214 U. S. Supreme Court Reports, 525, this Honorable Court, discussing this provision of the Constitution and the various ways by which the United States Government may acquire title to property, uses this language:

"This power of exclusive legislation is to be exercised, as thus seen, over places purchased, by consent of the Legislatures of the States in which they are situated, *for the specific purposes enumerated.*"

The averment in the petition for writ of prohibition, with reference to the property in question is contained in this language:

> "That at the time the cause of action alleged in the petition filed by the said Haines in the said action of law arose, and at the time that each and every summons issued in said action at law was served upon each of the said defendants therein, to-wit, your petitioners herein, the said The Ohio River Contract Company, was engaged in certain work and labor incident to the construction and erection of a canal or lock at the direct instance and under the sole authority of the government of the United States of America, and that government only; *that said work was performed wholly and entirely, save as hereinafter more fully appears,* upon a certain tract of land acquired by the United States of America either by purchase or condemnation, and with the consent of the Commonwealth of Kentucky." (Pages 2 and 3, Petition for Writ of Prohibition.)

It is not averred in the petition when or for what purpose the land in question was acquired by the United States, or that it was acquired by the consent of the Legislature of Kentucky. Hence, the land in question is not, for any purpose, brought, by the averments of the petition, within the constitutional provision, *supra.* The averment that the tract of land in question, of which no description whatever is given, is territory over which the United States has exclusive legislative jurisdiction, is but the allegation of a legal conclusion.

Unless it was acquired for some of the purposes mentioned in Subsection 18, Section 8 of Art. 1 of the United States Constitution, *supra,* the United States acquired

no exclusive legislative control over it. That the United States may acquire and hold property, as any private proprietor may, is well settled. (*Fort Leavenworth R. R. Co.* v. *Lowe, supra.*) It is not even shown that the strip of land referred to is suitable or available for the erection of any building whatever upon it, for, whether it is five or fifty feet wide, or one foot or one thousand feet long, is not averred.

It is clear that *Subsection 17 of Section 8, Article 1 of the Constitution,* contemplates land acquired by the United States Government, which would be occupied by agents or representatives of the United States in the discharge of their official duties. It is quite easy to understand why the Federal Government should desire to have and acquire exclusive legislative jurisdiction in such places, and control, by its own law, its agents, as well as those dealing with them in such places, but it is not conceivable that the Constitution meant to confer exclusive legislative jurisdiction on the United States over a mere strip of land, extending along a canal bank, upon which no structure of any kind could be erected, and where no agents of the Government would ever be located.

It is also well settled that, even where the United States has acquired exclusive legislative jurisdiction over land acquired by it, with the consent of the State, it is not incompatible with the sovereignty of the Federal Government that it should permit, or that the State, from which the acquired territory was taken, should retain or exercise the right of serving process within such ceded terri-

tory, but it is, we apprehend, needless to discuss that question in this case.

The consent here "for the service of process upon plaintiff in error at Lock 41, 31st and River, Government Reservation," even if it apepared that the territory was within the exclusive legislative control of the United States Government, was expressly given by the defendant itself, by the statement filed by it in the office of the Secretary of State of Kentucky, and is, of course, binding upon it.

The alias summons, afterwards executed upon the plaintiff in error was, as heretofore stated, delivered to the same agent at his home in the city of Louisville.

THE TEMPORARY RESTRAINING ORDER WAS NOT REVIVED BY THE SUPERSEDEAS.

The plaintiff in error filed its petition for Writ of Prohibition against the defendant in the Court of Appeals of Kentucky, on April 25, 1916. On April 26, 1916, the court granted a temporary restraining order, by which the defendant was "temporarily restrained and prohibited from proceeding further in the action (naming it) until the further orders of this court." (Trans., p. 40.)

On May 26, 1916, judgment was rendered by the Court of Appeals of Kentucky, overruling the petition for writ of prohibition, denying the writ and awarding respondent judgment for his costs. (See Trans., p. 44.) On June 27, 1916, the writ of error was allowed and the order provided "that said writ of error operate as a supersedeas." (Trans., p. 57.)

The contention may be made here, as it was made by plaintiff in error in the State court, that this order had the effect of reviving the temporary restraining order granted before the petition for writ of prohibition was heard and overruled.

The fallacy of the argument is apparent:

(1) The judgment, denying the writ of prohibition, except as to the costs awarded respondent, was self-executing and could not be superseded. A supersedeas is obtained only to prevent the execution of a judgment, which requires some other writ or proceeding for its enforcement.

As said in *Runyon* v. *Bennett*, 4 Dana, 599:

> "Its object and effect are to stay future proceedings, and not to undo what is already done. It has no retroactive operation, so as to deprive the judgment of its force and authority from the beginning, but only suspends them after and while it is itself effectual * * * but that whatever is done according to the judgment before the supersedeas takes effect, is upheld by the authority of the judgment, and is not overreached by the supersedeas."

This statement of the law has been repeated and approved in numerous cases. See *Gardner* v. *Continental Ins. Co.*, 31 Ky. L. R. 69; *May* v. *Commonwealth*, 160 Ky. 985, and numerous cases referred to in the opinions.

An apt statement of the rule, and one particularly applicable to the facts in this case, is found in the opinion of the Supreme Court of Iowa. We quote from the opinion:

"When the pleadings were finally settled, and before trial was begun, the appellant moved to have the cause set down for trial as an equitable action. This motion was overruled, and the appellant appealed from said order, and filed a supersedeas bond. This, it is said, deprived the court of jurisdiction to proceed with the trial to a jury, and the judgment rendered upon the verdict is therefore void. The order appealed from was self-executing, requiring no writ or process of any kind to carry it into effect. There was nothing to supersede by the giving of a bond, and the filing of such an instrument could have no effect to deprive the court of jurisdiction to proceed with the trial. See second paragraph of the opinion in Allen v. Church, 101 Iowa, 123, 70 N. W. 127. To hold otherwise, and say that, by appealing from an interlocutory ruling, a party may deprive the trial court of jurisdiction to take any further step in the case until, in the slow course of appellate procedure, it is remanded, only to begin another round through the appelate tribunal from the next adverse ruling, would be to deprive courts of the power to administer substantial justice, and prolong litigation until Jarndyce v. Jarndyce would cease to be any exaggeration of the law's delays." (First National Bank v. Dutcher, 128 Iowa, 413.)

The rule is stated with equal clearness by the Supreme Court of Missouri in the following language:

"Our law regulating practice in injunction and appeals is essentially the same as that prevailing in the Federal courts and those of the other States; and overwhelming weight of authority is that injunctions ordered on final hearing on the merits was not vacated by an appeal from the decree. A stay of proceedings, from its nature, operates only on orders and judgments commanding some act to be done, and does not reach injunctions." (*State, Ex rel, Busch* v. *Dillon,* 96 Mo. 56.)

To the same effect are the cases of—

Gardner v. Gardner, 87 N. Y. 18.
Genet v. Delaware & H. Canal Co., 113 N. Y. 475.
Hawkins v. State, 126 Ind. 296, 26 N. E. 43.
Sixth Ave. R. Co. v. Gilbert Elev. R. Co., 71 N. Y. 430.
James v. Markham, 125 N. C. 145, 34 S. E. 241.
Bullion, C. & C. Min. Co. v. Eureka Hill Min Co., 5th Utah, 151, 13 Pac. 174.

See also State, *ex rel*, Gibson v. Superior Court, which is reported in 1st L. R. A. (N. S.) 554.

In reference to this very matter the Court of Appeals of Kentucky has said:

"We understand the contention of the petitioner to be that the order of acting Chief Justice Settle directing that the order granting the writ of error should operate as a supersedeas, had the effect of keeping the temporary restraining order in force until the case should be finally disposed of in the Supreme Court of the United States. This contention is based upon the fact that no formal order was entered dismissing the temporary restraining order when the case was finally disposed of by the denial of the writ.

"We do not so understand the effect of the final order of this court denying complainant's petition for the writ of prohibition. It should not be overlooked that the temporary restraining order was issued only for the purpose of preserving the status of the case pending the trial, and until some further or final order should be made. It expressly so declares. So, when the case was finally heard and the writ of prohibition was denied, that was the final order in the case (Civil Code, Sec. 475), and necessarily carried with it a dismissal of the entire case, including the annulment of the temporary order of

> prohibition. Any other view must necessarily hold that the temporary writ of prohibtion was in effect after the final writ of prohibition had been denied; a position that can not, with reason, be maintained." (*Ohio River Contract Co.* v. *Gordon,* 172 Ky. 407-8.)

The order of supersedeas could in ths case only suspend so much of the judgment as awarded the respondent his costs, but it was not effectual even for that purpose, for the reason that the statute, Section 1007, R. S. Comp. St., 1901, was not complied with and the order of *supersedeas was not executed.*

The statute reads:

> "In any case where the writ of error may be a supersedeas, the defendant may obtain such supersedeas *by serving the writ of error* by lodging a copy thereof for the adverse party in the clerk's office, where the record remains within sixty days, Sundays exclusive, after the rendering of a judgment complained of, and giving the security required by law within sixty days after the rendition of such judgment or afterward, with the permission of a justice or judge of the appellate court. And in such cases, where a writ of error may be a supersedeas, executions shall not be issued until the expiration of ten days."

We have filed, to be read on the hearing of this motion, the certificate of the Clerk of the Court of Appeals of Kentucky, Mr. Keenon, to show that no copy of the Writ of Error has ever been lodged in his office for the appellee, and of a consequence that the statute has not been complied with, and that the court was, therefore, without power to grant the supersedeas. The very ques-

tion was passed upon by this Honorable Court in *Kitchen* v. *Randolph*, 93 U. S. 86, 23 Law Ed. 810, and in *Sage* v. *Cent. R. R. Co.*, 93 U. S. 412, 22 Law Ed. 933.

We quote from the opinion of the court in *Kitchen* v. *Randolph, supra:*

> "Mr. Chief Justice Waite delivered the opinion of the court:
>
> " 'The only question presented by this motion is as to the *power of a justice* of this court to allow a supersedeas in cases where an appeal was not taken *or a writ of error sued out and served within sixty days*, Sundays exclusive, after the rendition of the decree or judgment complained of.' "

After giving a history of all the legislation by Congress on the subject, the opinion continues:

> "It is evident that Congress intended in this revision to change to some extent the Law of 1872, 18 Stat. at L., 196. The fair inference from the opinion in Telegraph Co. v. Eyser is that as that law "was silent as to the writ,' and '*it was not said when it must be served,*' a supersedeas could be obtained by the execution, approval and filing of the necessary security, even though the writ of error should not be served or the appeal taken until after the expiration of sixty days. In this way the old rule requiring promptness of action to obtain a stay of proceedings was substantially abandoned. A justice or judge could, in his discretion, grant the stay at any time, if the writ should be issued and served within the two years allowed for that purpose.
>
> "*The revised section is not 'silent as to the writ' and it is 'said when it must be served.'* If a supersedeas is asked for when the writ is obtained, *the writ must be sued out and served within the sixty days,* and the requisite bond executed when the cita-

tion is signed. The policy of the old law is thus restored, the only modification being in the extension of time allowed for action. Sixty days are given instead of ten.

"Had the section stopped here, a plaintiff in error or appellant would have been compelled to elect, when he sued out his writ of error, or took his appeal, whether he would have a supersedeas or not; because it is made one of the conditions of the stay of proceedings that the requisite security shall be given, upon the issuing of the citation. Having once made his election, he would be concluded by what he had done. But Congress, foreseeing, undoubtedly, that cases might arise in which serious loss would result from such a rule, went further and, in a subsequent part of the section, provided *that if a writ of error had been served, as required in the first paragraph,* a stay might be had as a matter of right by giving the required security within sixty days and afterwards, as a matter of favor, if permission could be obtained from the designated justice or judge. Thus prompt action in respect to the writ was required and indulgence granted only as to the security.

"It is contended, however, that the words 'having served his writ of error as aforesaid' as used in this part of the section, have reference to the manner of service alone; that is to say, by lodging a copy thereof for the adverse party in the clerk's office, where the record remains, and not to the time, sixty days. *But time is one of the necessary ingredients in the prescribed service to secure a supersedeas under the provisions of the first part of the section.* It can not be dispensed with there any more than it could have been under the Act of 1789, 1 Stat. at L., 73; and under that Act, as has been seen, it was essential. In fact, it was the one thing upon which, more than all others, the relief sought for depended. Service, 'as aforesaid,' must, therefore, mean such a service as would have perfected the stay, if the proper security

had been given. Relief is extended only in respect to the security.

"What afterwards occurred is equally indicative of the intention of Congress. As the section originally stood, no execution could issue, when the writ of error might be a supersedeas until the expiration of sixty days, the time allowed for perfecting a supersedeas without leave. If the writ had been issued and served without the security required for a supersedeas, execution must still be withheld until the time had elapsed within which the further security might be given as a matter of right. This changed the law from what we held it to be in Comrs. v. Gorman, and at once upon the discovery of the effect of what had been done, the amendment was adopted limiting the time to ten days, as it originally stood. Nothing was done, however, towards adapting the sectoin as revised to the liberal construction of the Act of 1872, indicated in Telegraph Co. v. Eyser.

"We are, therefore, of the opinion that, under the law as it now stands, *the service of a writ of error,* or the perfection of an appeal *within sixty days, Sundays exclusive, after the rendering of the judgment* or the passing of the decree complained of, *is an indispensable prerequisite to a supersedeas, and that it is not within the power of a justice or judge of the appellate court to grant a stay of process on the judgment or decree, if this has not been done.* The appeal was taken in this case after the expiration of sixty days, and the motion to vacate the supersedeas must, for that reason, be granted." (*Kitchen* v. *Randolph,* 23 L. Ed. 810.)

The ruling is, we think, conclusive. Proceedings for writ of prohibition are regarded as at common law, and not in equity. Hence, proceeding to secure review in the United States Supreme Court must be by writ of error, and not by appeal. The complainant's counsel recognize

this by proceeding by writ of error, but, as has been said:

> "Strict compliance with the statute is required, however; for supersedeas is purely a statutory remedy, and unless the prescribed steps are taken within sixty days, Sundays excluded, from the rendering of the decree, it is not within the power of the court to award a supersedeas, although the bond required may be given after that time, with the permission of the Appellate Court." (Sec. 2063, p. 515, Montgomery's Manual of Fed. Procedure.)

PLAINTIFF IN ERROR CONFUSES THE ADMIRALTY JURISDICTION OF UNITED STATES COURTS WITH THEIR GENERAL JURISDICTION.

It sufficiently appears in the averments of the answer, filed by the plaintiff in error in the court below, that the strip of land, in the answer referred to, was acquired by the United States for the purpose of widening the canal bed and for canal purposes.

By Section 2, Article 3, of the United States Constitution, it is provided as follows:

> "The judicial power (of the United States) shall extend to all cases in law and equity, arising under this Constitution, the laws of the United States, * * * to all cases of admiralty and maritime jurisdiction, etc."

By this provision of the Constitution, the United States secured all the jurisdiction it needs over navigable rivers and harbors in the United States. Until 1851 it was assumed that the Federal jurisdiction on rivers ex-

tended only as far as the ebb and flow of the tides, but, by later decisions of the Supreme Court, it has been held that rivers navigable in fact are navigable in law, and that the jurisdiction of the Federal courts, under the provision of the Constitution cited, extends to all rivers and artificial waterways, such as canals, that may be or are used for interstate commerce.

> "The Supreme Court has entirely repudiated the doctrine that navigable waters are such only as are affected by the tides, substituting the rule, as better adapted to the circumstances of our country, that rivers navigable in fact are navigable in law. Thus the admiralty jurisdiction has extended to all public navigable lakes, rivers and waterways, which are used or may be used as highways for commerce to be carried on between States or with foreign nations." (*Cooley's Const. Lim.*, 2d Ed., page 155; 1st Cyc., page 816, col. 1.)

It is well settled by numerous adjudication of this Honorable Court that the admiralty jurisdiction over such waters is confined *to torts, committed on the water,* and that admiralty courts have no jurisdiction of an action for damages caused by the collision of a boat with the shore, or with any piers, or other permanent structure, or even floating structure, attached to the shore.

And so an action for "personal injury received on shore, although caused by negligence originating on a ship, is not within the jurisdiction of admiralty."

Price v. *Bell of the Coast*, 66 Fed. 62.
The Mary Garrett, 63 Fed. 1009.
Johnon v. *Chicago & Pacific Elevator Co.*, 119 U. S. 388.

These cases well illustrate the disposition of this Honorable Court to confine the admiralty jurisdiction to its proper limits, leaving the parties the right to prosecute actions arising at common law or under the statute in the courts of the States. There could be no reason why the United States would wish to have or hold jurisdiction over a strip of land used for canal purposes, and which, we may assume, will become a part of the bed of the canal, other than that conferred upon it by Section 2, Article 3, of the Federal Constitution, *supra*, and as to the service of process from the State courts on land acquired by the United States, for any other than the specific purposes mentioned in Subsection 17, Section 8, of Article 1 of the Constitution, the Supreme Court has held that the reservation of such power or jurisdiction in the State is no encroachment whatever upon the jurisdiction of the United States Government; that it was never intended that such pieces or strips of ground should become places of refuge for those seeking to avoid the jurisdiction of the courts of the State in which such land may be situated, and the court has even gone to the extent of holding that the jurisdiction of the State courts to have the process executed in such territory is the same, whether the right be expressly reserved in the act of the State, consenting to the grant or not.

In the case of *Fort Leavenworth R. R. Co.* v. *Lowe, supra*, it is said:

> "The reservation which has usually accompanied the consent of the States that civil and criminal process of the State courts may be served in the places

purchased, is not considered as interfering in any respect with the supremacy of the United States over them; but is admitted to prevent them from becoming an asylum for fugitives from justice. And Congress, by statute passed in 1795, declared that cessions from the States of the jurisdiction of places where light-houses, beacons, buoys or public piers were or might be erected, with such reservations, should be deemed sufficient for the support and erection of such structures, and if no such reservation had been made, or in future, cessions for those purposes should be omitted, civil and criminal process issued under the authority of the State or of the United States might be served and executed within them. 1 Stat. at L., 426, Chap. 40."

The statute referred to in the opinion is valuable as indicating the public policy of the United States, which is not to extend its jurisdiction beyond the necessities of the Government, for the maintenance and enforcement of its jurisdiction over subjects lying clearly within it.

All through the petition for writ of prohibition we find the strip of land in the petition referred to described as a Government reservation. This, of course, is clear error. A Government reservation is found where territory originally belonged to the Government was erected into a State, the Government, however, reserving, for its own purposes, certain defined limits of territory. There is no reservation here. Plaintiff's counsel can not cite to the court a single instance where the Federal Government claimed or exercised any jurisdiction over a canal bank in the United States, or where the maritime jurisdiction was ever extended even to embrace causes of action, either in contract or in tort, arising out of

transactions conducted on a canal bank. The canal is not a building, within the meaning of Subsection 17, Section 8, of Article 1 of the Constitution, and the jurisdiction of the Federal Government is no greater and extends no further over a canal bank than over the bank of any navigable river. That it would give rise to great inconvenience and wrong, both to the United States and to the States, if the jurisdiction of the Federal Government could be made to extend along the banks of navigable rivers and canal banks, their whole length, throughout the States, is self-evident.

It was doubtless for the reason that it was well understood by the Legislature that the admiralty jurisdiction of the United States extended only to torts, occurring on the navigable waters, that it was deemed needless to expressly reserve the right to execute civil or criminal process issuing by State authority on lands acquired by the United States, for locks, dams or canals, as provided in the Act of August, 16, 1882, Section 2376, Kentucky Statutes, but it will also be noticed that the section named does not expressly cede jurisdiction to the United States over land acquired for such purposes. It will be noticed, too, that by Section 2376a, Section 2376b and Section 2376c, Kentucky Statutes, wherever jurisdiction is ceded by the State of Kentucky to the United States, there is an express reservation of the right to have executed therein the civil and criminal process issued by State authorities. It is, we think, manifest that the Legislature deemed it needless, as we have said, to expressly retain similar right as to lands acquired for canal purposes, for

the reason that the only jurisdiction the United States could exercise over such canals would be the admiralty jurisdiction, which is confined, as we have said, to torts, occurring upon the waters.

THE WRIT OF PROHIBITION CAN NOT BE INVOKED WHERE THE ERROR, IF ANY, CAN BE CORRECTED ON APPEAL.

On this point, the opinion of the Court of Appeals of Kentucky in the case, which is copied in the record, furnishes ample authority. (*Ohio River Contract Co.* v. *Gordon*, 170 Ky. 412.)

That the Circuit Court had jurisdiction to determine whether or not the defendants in the case before it were amenable to its process and whether or not the process had been duly executed upon them, seems clear. Such jurisdiction was necessarily implied and conceded by the several motions made by the plaintiff in error. It is not only conceded but invoked by the special demurrer, challenging the jurisdiction of the court over the subject of the action. The plaintiff in error surely will not be heard to say that the Circuit Court had jurisdiction to determine that issue in its favor, but had no jurisdiction to determine it against it.

It is well settled that a writ of prohibition will not be awarded to prevent a court from deciding any question in a case before it erroneously, nor even from enforcing an erroneous judgment. A writ of prohibition, or an

application therefor, can not be made to operate as an appeal.

Bank Lick Turnpike Co. v. *Phelps,* 81 Ky. 613.
Hughes v. *Holbrook,* 32 Rep. 1210.
Thomas v. *Davis,* 110 S. W. 408.
Com. v. *Weissinger,* 143 Ky. 368.

It is also well settled that a writ of prohibition will not be granted, where, even if there be error in the action or ruling of the lower court, the party has an adequate remedy by appeal.

The case of *White* v. *Kirby, Judge,* 147 Ky. 497, seems to be directly in point.

In that case an action was instituted in the Jefferson Circuit Court against two defendants, one a corporation, which had its principal office in the city of Louisville; the other, a natural person, one John G. White, who resided in Clark County, and was served with process in that county. White filed his plea to the jurisdiction of the court, on the ground that the corporation, joined with him as a defendant, was not a necessary party to the suit, and that the Jefferson Circuit Court, therefore, had no jurisdiction over him, as he had been served with process in Clark County. The Circuit Court overruled White's plea to the jurisdiction and ordered him to answer. Thereupon, just as the petitioner has done here, White filed his petition in the Court of Appeals to obtain a writ of prohibition, restraining Judge Kirby from proceeding further with the case, on the ground that he was without jurisdiction as to him. (White.)

In refusing the writ, the court said:

> "We have held in a number of cases that we will not interfere with the Circuit Court, where there is adequate remedy by appeal and so the only question we deem it necessary to determine is whether White has an adequate remedy by appeal in the case before us." (*Id.*, 147 Ky. 497.)

The court held that White had an adequate remedy by appeal, if the lower court erred in determining that it had jurisdiction over him or in giving judgment against him.

And, in another case, where an appeal did not lie, the court said:

> "That no provision has been made for appeal from the alleged erroneous order of the court in this case *does not* authorize a perversion of the purpose for which by law a writ of prohibition may be granted, or its extension to cases in which it does not lie." (*Bank Lick Turnpike Co.* v. *Phelps*, 81 Ky. 617.)

HAINES HAS THE RIGHT TO HAVE HIS CASE AGAINST THE CONTRACT COMPANY HEARD SOMEWHERE.

The plaintiff in error will, we suppose, admit that John J. Haines, plaintiff in the court below, has the right to have his case against it tried somewhere; but, if the Kentucky court has not jurisdiction to hear and determine it, then what court has such jurisdiction?

The plaintiff in error, as the record shows, filed its petition for removal of the case to the United States Circuit Court. The application was overruled in the State court, but the plaintiff in error, in the exercise

of its right, filed a duly certified transcript of the record in the United States Circuit Court for the Western District of Kentucky. The defendant in error entered his appearance in that court, filed his answer to the petition for removal, and moved to remand the case to the State court. That motion was heard, evidence was offered by the parties, and the motion was sustained, as the record (a) shows. The very same questions, which the plaintiff in error presents here, were made and presented on that hearing. The United State court must have adjudged that the petitioner's claim, that the State court did not have jurisdiction of the subject of the action, or that the United States court had exclusive jurisdiction thereof, was not well founded. That judgment has not been appealed from; indeed, could not be, and is now in full force and effect.

The United States court refused to entertain the case and thereafter the plaintiff in error asked and now asks that the State court shall not be permitted to hear it. That the contention leads to palpable absurdity, we deem it needless to argue.

We ask that the several motions made by the plaintiff in error be overruled, and that the motion of the defendant in error to affirm be sustained.

Respectfully submitted,

MATTHEW O'DOHERTY,
Counsel for Defendant in Error.

MATTHEW O'DOHERTY,
MORTON K. YONTS,
Counsel for Defendant in Error.

January 24, 1917.

(a) Trans. p. 2.

FILED
MAR 1 1917
JAMES D. MAHER
CLERK

No. 594

SUPREME COURT OF THE UNITED STATES

OHIO RIVER CONTRACT COMPANY,
Plaintiff in Error,

versus

HONORABLE THOMAS R. GORDON, Judge
of the Jefferson Circuit Court, - Defendant in Error.

Supplemental Brief for Defendant in Error.

MATTHEW O'DOHERTY,
Counsel for Defendant in Error.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

SUPREME COURT OF THE UNITED STATES

OHIO RIVER CONTRACT COMPANY, - *Plaintiff in Error,*

versus

HONORABLE THOMAS R. GORDON, JUDGE OF THE JEFFERSON CIRCUIT COURT, *Defendant in Error.*

SUPPLEMENTAL BRIEF FOR DEFENDANT IN ERROR.

May it please the Court:

It is, we think, well settled by repeated decisions that the United States Supreme Court will not, on Writ of Error, review the decision of the State Court upon a question of fact, although the Federal question would or would not be presented, according to the way in which the question of fact was decided.

> "That this court in an action at law at least has no jurisdiction to review the decision of the highest court of the State, upon a pure question of fact, although a Federal question would or would not be presented according to the way in which the question of fact was decided, is clearly settled by a series of later decisions, some of them like the one now before the court."
>
> Dower v. Richards, 151 U. S. 667.

It would seem to follow that the decision of the Kentucky Court on the questions of fact arising on the motion of the Ohio River Contract Company, to quash the service of process upon it, is not open to review in this court.

It is also well settled that a Writ of Prohibition is never allowed, unless it clearly appears that the inferior court is about to exceed its jurisdiction. It can not be made to serve the purpose of a Writ of Error or *certiorari* to correct errors of law or fact within its jurisdiction.

Ex parte Detroit River Ferry Co., 104 U. S. 519.
Ex parte Cooper, 143 U. S. 472.

The plaintiff in error here, in effect, asks the court to reverse the decision of the State Court

(1) Overruling the motion of the plaintiff in error to quash the sheriff's return on the process served upon it.

(2) To reverse the judgment of the State Court, sustaining the demurrer to the first paragraph of its answer.

We think this can not be done.

Respectfully submitted,

MATTHEW O'DOHERTY,
Counsel for Defendant in Error.